Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID BOYD,

Petitioner,

v.

GUIDANT SALES CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY G. CHOVANEC*
DAVID FIELDING
LAURA HALLMON

FIELDING, PARKER & HALLMON, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102
(817) 390-0300

*Counsel of Record

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In this pre-*Gross* ADEA trial, the jury found both willful age discrimination and mixed motive. The trial court, over petitioner's objection, entered a judgment for the respondent. The Fifth Circuit's opinion, post-*Gross*, held that the jury's finding of willful discrimination was not a finding of "but for" causation and that the finding of mixed motive was a finding of "but for" causation in favor of the respondent and the petitioner lost.

The questions presented are:

1. Whether the "but for" causation standard defined in *Gross* for recovery of actual damages in an ADEA case is a lesser or higher standard of causation than a jury finding of "willful" age discrimination under 29 U.S.C. §626(b).

2. Whether the "but for" causation standard defined in *Gross* overturns a jury's willful age discrimination finding which was obtained by petitioner under the two-tier liability framework established for pretextual terminations under the ADEA and *Reeves v. Sanderson Plumbing* and *McDonnell Douglas v. Green*.

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PETITION FOR WRIT OF CERTIORARI

David Boyd petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which held that a jury's finding of willful age discrimination – in a pre-*Gross* jury trial – did not establish "but for" causation. The opinion stated that the jury's "yes" answer to the defendant's mixed-motive question "doom[ed] Boyd's chances of reversal or remand." The holding directly contravenes both this Court's prior decisions and dramatically misconstrues *Gross*.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated August 21, 2009, is reproduced at Appendix A. (Pet. App. A. pp. 1-3)

The trial court's Order on petitioner's Motion for New Trial and respondent's Motion for Judgment as a Matter of Law is reproduced as Appendix C. (Pet. App. C. pp. 6-7)

The final judgment from the United States District Court for the Northern District of Texas, dated January 8, 2008, is reproduced at Appendix D. (Pet. App. D. p. 8)

The trial court's decision denying Defendant's Motion for Summary Judgment, dated February 7,

2007, is reproduced at Appendix F. (Pet. App. F. pp. 28-42)

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider Boyd's petition for a writ of certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, Section 626(b).

> **Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion.**
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title:

> Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. . . .

Title 29 United States Code, Section 216(b).

Damages; right of action; attorney's fees and costs; termination of right of action.

> Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in

> which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

STATEMENT OF THE CASE

Petitioner is a 59 year old salesman who had spent the last thirty years of his life working for various manufacturers of battery operated pacemakers (which maintain a steady heart rhythm) and defibrillators (which control life-threateningly fast heart rates). (2RR:148-151)* It was a highly stressful job. (2RR:162) "Sale" of the devices by petitioner included participation in the operating room to watch the proper placement of the device during surgery and conducting tests on the implanted device to make certain that it functioned properly. (2RR:153-155) It is a life-saving procedure. (2RR:162) After implantation, there was a follow-up required every six months in the doctor's office where the device was rechecked to be sure it was operating properly. Petitioner trained doctors' staffs and, over the years, interacted with thousands of nurses and patients, as well as hundreds of doctors. (2RR:160-161) In the late 1970's petitioner began to sell pacemakers for Intermedics, Inc. and did not receive a single complaint in twenty

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* Citations herein shall be to the volume and page of the transcript/reporter's record ("___RR:___") or the district clerk's record ("___R:___")

years. (2RR:161) In 1999, respondent purchased Intermedics and the petitioner began employment with respondent. (3RR:13; 3RR:77)

Respondent terminated petitioner in 2004 at the age of 59. (3RR:110) During his five years of employment, he had a stable base of physician customers. Petitioner stipulated at trial, though, that respondent had received complaints during that time from its employees and customers regarding his personality and attitude. (2RR:144) Petitioner retained these customers after his termination in 2004. (3RR:254)

The termination occurred within months of the arrival of a 34 year old supervisor who, the evidence showed, wanted "young guns" as salesmen for the sales region under his control. (4RR:95-96)

This young supervisor, Roger Owens (hereafter "Owens"), became Area Director for respondent, replacing a predecessor aged in his late 50's. (5RR:42-43) Upon Owens' arrival in early 2004, he had a conversation with a subordinate, Robert Hodges (hereafter "Hodges"), about petitioner. (4RR:92) Hodges, a co-worker of petitioner's, was fifty years of age at the time of trial. (4RR:77)

Owens commented to Hodges that petitioner had "been at this an awful long time[.]" (4RR:92) Owens also inquired "how much longer [petitioner] plans to hang around." (4RR:92) Hodges testified it was "evident from discussions with [Owens]" that he wanted to get the "entire organization younger." (4RR:95-96) Owens actually told Hodges that he wanted to hire "young guns[.]" (4RR:96)

Hodges' testimony is supported by the testimony of Cary Paulette (hereafter "Paulette"). Paulette was the direct supervisor of petitioner at the time he was fired and testified that he did not agree with Owens' decision to terminate. (3RR:170; 3RR:183) He also testified that he believed that age was a factor in Owens' decision. (3RR:184)

Respondent, in its case, presented substantial evidence, in addition to petitioner's stipulation about the existence of complaints in his personnel file, of negative comments in performance appraisals from 2001, 2002 and 2003. This evidence formed the backdrop for the culminating events preceding petitioner's termination.

The culminating event began during the mid-afternoon of Friday, July 30, 2004. Petitioner was on his way to the hospital to participate in an implant procedure. (3RR:91) He received a call on his cell phone from an LVN named Katie Chapman, who worked at Fort Worth Heart – a follow-up clinic, whose relatively untrained staff did pacemaker performance checks for doctors over the telephone to assess whether the implants were working properly. (3RR:89) Chapman had not been on the job very long, did not have prior cardiology experience and had no pacemaker experience. (3RR:92) Petitioner testified that he had tried to help train her, but she was a person "that wasn't really getting it[.]" (3RR:92)

Chapman reported to petitioner that she was having problems with a magnet rating on a device.

She indicated that the magnet rating, which indicates decay in the device's battery life, had actually increased from 85 to 100. (3RR:89) Since battery life, i.e. magnet rates, can only decrease, petitioner explained to Chapman that there was no problem and that, in all probability, the patient's device had been switched out for a new device.[1] (3RR:91)

To be certain his analysis was correct, though, petitioner asked Chapman if the patient was having any other problems or physical distress. (3RR:91) Chapman replied no. (3RR:91) Petitioner then concluded the conversation by saying that since he was required to be involved in an implant procedure that afternoon, that he would be unable to get to Fort Worth Heart before they closed at 5:00 p.m. to confirm his assessment in person. (3RR:91) Since the patient was having no problems, petitioner told Chapman he thought the situation would keep until the following Monday. (3RR92) Chapman said fine, "not a problem." (3RR:92)

Unbeknownst to petitioner, Chapman then called a technical services representative of respondent, Jeremy Lind (hereafter "Lind"), to complain that Chapman "was having problems getting someone to go see [a] patient." (3RR:93) Lind then called petitioner. (3RR:92) After learning of Chapman's complaint, which he believed unfounded, petitioner

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[1] Petitioner subsequently confirmed this to be the case. (3RR:91)

became upset and, after explaining the situation vented to Lind – a fellow Guidant employee. (3RR:93) Petitioner admitted at trial that he may have used the words "bulls**t" and "bi**h" in his conversation with Lind in reference to the situation with Chapman.[2]

The office was "ecstatic" when Chapman's complaint to Lind about petitioner came in on Friday, July 30th. (3RR:182) Owens himself talked to Paulette about it, "almost like we have got him." (3RR:182) Owens asked Paulette "to document the negative" of what happened. (3RR182) A flood of e-mails ensued which contained complaints and editorial negatives both old and new. (Dx.25, 26, 27, 28 and 29)

Owens terminated petitioner. (3RR:183) Paulette, petitioner's direct supervisor, testified at trial that he did not agree with the termination and would not have fired petitioner over this incident. (3RR:183-184) He also testified that he believed age was a motivating factor in Owens' decision and that the decision was not performance based. (3RR:184) Respondent impeached Paulette at trial based upon his prior termination by respondent.

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[2] The vulgarities were cited by Guidant as a basis for Petitioner's termination. Other evidence in the record showed that Owens himself used the words "bi**h" and "d**e" among co-workers and did not insist on a vulgarity-free workplace environment. (4RR:81-85)

Prior to the submission of the charge to the jury, petitioner presented his proposed liability question to the trial court which asked if petitioner had been terminated "because of" age. 29 U.S.C. §623(a)(1). (4R:956) Petitioner's proposed question was rejected. (4R:956) The district court apparently preferred respondent's formulation, i.e. "motivating factor." (4R:956) Petitioner did not object to the district court's decision in this regard.

Petitioner did object, though, to the submission of respondent's mixed-motive affirmative defense, i.e. Question #3. (5RR:160) The objection was overruled. (5RR:161) The Court granted respondent's request that damages be answered only upon a negative finding on Question #3. (5RR:160-161)

With regard to respondent's mixed-motive affirmative defense the jury sent out a note, "What happens to the defendant if Question #3 is answered 'yes' • are they fined/slap on wrist or what? • court cost if no money is awarded?" (5R:1132) The Court answered that, "This is not an issue for you to consider." (5R:1132)

The jury found that: 1) age was a motivating factor in respondent's termination of petitioner; 2) respondent's discrimination had been willful; and 3) respondent would have terminated petitioner even in the absence of consideration of age. (5R:1143-1144) No damage findings were made because they were submitted conditionally on a negative answer to Question #3.

The Court then signed a judgment in favor of respondent based ostensibly on the jury's answer to Question #3. (5R:1155) Pursuant to a pre-trial agreement to submit attorneys' fees by affidavit after the trial, petitioner requested that he be awarded attorneys' fees based upon the finding of willful age discrimination. (1RR:24-25; 5R:1170) Petitioner also requested that judgment be entered in his favor, reiterating his objection to the submission of the mixed-motive affirmative defense. (5R:1168) Lastly, based upon the absence of findings on damages, he asked for a new trial on damages, liquidated damages, and mandatory attorneys' fees and costs under the statute. (5R:1170) The Court denied all relief. (5R:1186)

In the alternative, petitioner requested that the district court issue an opinion explaining its rationale for entry of judgment and denial of mandatory attorneys' fees under 29 U.S.C. §216(b) (5R:1170) The motions were denied. (5R:1186)

Petitioner appealed. While on appeal, this Court issued its decision in *Gross v. FBL Financial*. The Fifth Circuit Court of Appeals upheld the trial court's judgment, citing *Gross*, stating that, "The jury's affirmative answer to the [mixed-motive question] dooms [petitioner's] chances of reversal or remand." (Pet. App. A. p. 2) The Court concluded that petitioner "has had his chance to convince a jury that he would not have been terminated but for his age, and he is not entitled to a new trial to attempt to establish that element." (Pet. App. A. p. 2) Petitioner complains of

this opinion and mandate of the Fifth Circuit voiding the jury's finding of willful age discrimination.

REASONS FOR GRANTING THE WRIT

Petitioner's case presents two reasons to grant the writ:

A. To review the proper two-tiered jury submission of all ADEA claims, and claims for attorneys' fees thereunder, in the post-*Gross* era; and

B. To confirm the standard of review for the plaintiff's prima facie and pretextual age discrimination evidence in the post-*Gross* era.

First, the Fifth Circuit has misapplied this Court's holding in *Gross v. FBL Financial,* 129 S.Ct. 2343 (2009) which left untouched the two-tiered liability scheme established in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) and *Hazen Paper Company v. Biggins,* 507 U.S. 604, 614 (1993).

Second, the Fifth Circuit has upended the standard of review for cases of pretextual age discrimination previously adopted in *Reeves v. Sanderson Plumbing,* 530 U.S. 133 (2000) and *Hazen Paper Company v. Biggins,* 507 U.S. 604 (1993). In a pretextual termination case, *Reeves* and *Hazen* held that a jury's finding of willful age discrimination should stand if supported by the employee's

establishment of a prima facie case and the presentation of evidence of pretextual discrimination. The Fifth Circuit has negated this standard of review based on *Gross v. FBL Financial,*129 S.Ct. 2343 (2009).

I.

The Fifth Circuit's overturning of the jury's willful age discrimination finding eradicates the ADEA's two-tiered liability scheme and conflicts with this Court's decisions in *Hazen Paper Company* and *Reeves* creating conflicting legal standards applicable to all claims of discrimination under the ADEA in the *post-Gross* era.

The Fifth Circuit's decision below, requiring enhanced evidence to uphold a jury's finding of willful age discrimination, effectively upends the ADEA's two-tiered jury submission by holding that *Gross's* newly stated "but for" causation standard requires evidence of causation beyond "willful." A brief look at the above Supreme Court precedents, the ADEA and the text of the jury charge submitted below show why.

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA") makes "willful violations" actionable. 29 U.S.C. §626(b). Questions of wilfulness are submitted to the jury conditionally through a two-tiered liability scheme under which some, but not all, ADEA violations give rise to

liquidated damages. *Hazen Paper Company v. Biggins,* 507 U.S. 604, 614 (1993).

This two-tiered liability scheme is reflected in the jury charge submitted by the district court below, which was taken verbatim from the respondent's proposed charge. (4R:942-945; 5R:1143-1144) (Pet. App. E. pp. 19-20) The trial court submitted "motivating factor" in the predicate question, not "because of" as requested by the petitioner. (4R:956) (Pet. App. E. p. 22)

The trial court submitted the petitioner's proposed instruction on the definition of "willful" in the charge:

> If you find Defendant terminated Plaintiff **because of** his age, then you must also determine whether Defendant's action was "willful." To establish willfulness, Plaintiff must also prove that, when Defendant terminated Plaintiff, Defendant either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for compliance with the ADEA. (emphasis added) (Pet. App. E. p. 19)

(4R:945; 4R:959; 5R:1140; 5R:1143) This instruction embodies the two-tiered formulation acknowledged by *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) and *Hazen Paper Company v. Biggins,* 507 U.S. 604, 614 (1993) to be proper under the ADEA.

In holding that the jury's second tier finding of "willful" fails to satisfy the newly created "but for"

standard established in *Gross* for the predicate finding, the Fifth Circuit has effectively obliterated the two-tier framework itself. This result cannot have been intended by this Court in *Gross*.

In addition to the rejection of the two-tier liability scheme under the ADEA, the Fifth Circuit's opinion calls into question the standards by which ADEA summary judgments and jury verdicts will be reviewed. In *Reeves*, the Fifth Circuit was reversed for imposing unwarranted additional evidentiary requirements in striking down a jury finding of willful age discrimination. *Reeves*, 530 U.S. at 149. Because a prima facie case and evidence to reject the employer's explanation (pretextual discrimination) was sufficient to uphold a jury finding of willful age discrimination in *Reeves*, by striking down such a finding in favor of petitioner here, the Fifth Circuit is once again imposing additional evidentiary requirements on a finding of willful age discrimination disallowed by this Court in *Reeves*.[3]

The Fifth Circuit is, therefore, being disingenuous when it cites *Gross* in support of its imposition of additional evidentiary requirements on

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[3] In fact, this Court has held that once a willful violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision. *Hazen Paper Company v. Biggins*, 507 U.S. 604, 617 (1993).

a willful finding. This is because, as noted above, *Gross* involved only heightened scrutiny of the predicate finding of liability under the ADEA, not the second-tier question of willfulness. A second-tier finding of willfulness under the ADEA necessarily incorporates the lesser causation standard contained in the predicate finding no matter what standard, in this case "but for" causation, this Court sets for proving that predicate finding. To hold otherwise is to invalidate this Court's interpretation and Congress's intended statutory scheme under the ADEA.

While pledging fealty to *Gross*, the Fifth Circuit simultaneously ignores its principal holding on the impropriety of mixed-motive submissions in ADEA cases. By expressly relying on the mixed-motive question, a question prohibited in *Gross*, to overrule the jury's finding of willful age discrimination, the Fifth Circuit has disregarded *Gross* itself. *Gross*, 129 S.Ct at 2348. This is plain error.

Even if one assumes that the Fifth Circuit's explicit reliance on the mixed-motive question was instead a weighing of the evidence in support of that impermissible finding, the result still conflicts with *Reeves*, which upheld a finding of willful age discrimination based upon the employee's establishment of his prima facie case and his presentation of evidence of pretextual discrimination.[4]

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[4] In addition to improperly imposing enhanced evidentiary burdens in violation of *Reeves*, the decision by the Fifth Circuit

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It is this improper imposition of heightened evidentiary requirements on appeal – beyond evidence of a prima facie case and pretextual discrimination in conflict with *Reeves* and *Hazen* – which widens the negative impact of the Fifth Circuit's opinion to essentially all ADEA cases. In other words, if *Gross* impacts the evidence required to uphold a finding of willfulness, as the Fifth Circuit has held, does *Gross* also impact the composition of the plaintiff's prima facie case and claims of pretextual discrimination?

The Fifth Circuit's opinion also improperly disregards the mandatory attorneys' fees requirement of 29 U.S.C. §216(b) as incorporated into the ADEA by 29 U.S.C. §626(b).

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improperly substitutes its judgment for the jury's concerning the weight of the evidence which is also prohibited. *Reeves*, 530 U.S. at 153. It is also a violation of *Hazen Paper Company v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701 (1993) which held that no enhanced evidentiary standard is required to be met to uphold a willful violation under the ADEA. *Hazen*, 507 U.S. at 617.

II.

The Fifth Circuit's overturning of the jury's willful age discrimination finding in this case imposes a new standard of review for pretextual age discrimination under the ADEA which conflicts with this Court's decisions in *Reeves* and *Hazen Paper Company*.

The Fifth Circuit has effectively overruled the liability framework established in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000) and *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993) for age discrimination cases based on evidence of pretext under the ADEA. As will be shown, this is the framework upon which petitioner relied to obtain a finding of willful age discrimination.

Respondent did not dispute and the trial court held that, as a matter of law, petitioner had established a prima facie case of age discrimination. (Pet. App. F. p. 40) Respondent then came forward, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1999), and articulated a legitimate non-discriminatory reason for its decision to terminate petitioner. (Pet. App. F. p. 40-41) Petitioner then presented substantial evidence at trial that the key decision maker – Roger Owens – was responsible for petitioner's termination and that he made the decision to terminate petitioner because of his age.

As noted above, upon Owens' arrival to work for respondent in early 2004, he commented about petitioner that he had been a pacemaker salesman

"an awful long time" and inquired how much longer petitioner planned to "hang around." (4RR:92) Owens' subordinates testified for petitioner at trial that it was "evident from discussions with [Owens]" that Owens wanted to get the "entire organization younger." (4RR:95-96) Owens at one point told a subordinate that he wanted to hire "**young guns**[.]"[5] (emphasis added) (4RR:96)

Petitioner also presented the testimony of Cary Paulette, who was the direct supervisor of petitioner at the time he was fired. Paulette testified that he did not agree with Owens' decision to terminate petitioner. (3RR:170; 3RR:183) He also testified that he believed that age was a factor in Owens' decision to fire petitioner. (3RR:184) Lastly, when the July 2004 complaint – discussed *infra* – came in against petitioner, Paulette testified that the managers at Guidant were "ecstatic . . . **we have got him**[.]" (emphasis added) (3RR:182)

Boyd presented additional direct evidence of Owens' age-related animus which was rejected by the district court.[6] Specifically, Paulette testified by bill of

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[5] This testimony was apparently very impactful on the jury which sent out two notes about that testimony during deliberations. (5R:1129-1131).

[6] The Fifth Circuit's holding and opinion is tantamount to judgment as a matter of law under FED. R. CIV. P. 50(b) because it overturns petitioner's jury finding of willful discrimination, despite the trial court's order overruling respondent's motion in this regard. (Pet. App. C. p. 6). Therefore, it is appropriate for this Court to "review all of the evidence in the record" in

(Continued on following page)

exception that prior to petitioner's termination Owens stated "for what I'm paying one Bob Hodges,[7] I could have two twenty-five year olds that will work 24 hours a day, 7 days a week without batting an eye." (3RR:278) This direct evidence was corroborated by Hodges himself. Hodges testified, also by bill of exception, that Owens' statement had been reported to him with the admonition from a co-worker shortly after it was made that "[Hodges], I'm not sure you're long for this world." (3RR:275)

The Court rejected the evidence from Paulette and Hodges saying the statements had only a "tangential connection" with the facts of the case despite the fact they had been uttered by Owens, the direct decision-maker who accomplished petitioner's termination, in the weeks and months before petitioner was fired and clearly showed age-related animus. (1RR:53) The Court acknowledged her rulings might justify reversal. (1RR:40) Petitioner moved a second time for admission of the evidence later during the trial. The Court overruled the request telling petitioner, "you've made your record." (4RR:210) Petitioner's motion for new trial on this point was also denied. (Pet. App. G. pp. 48-49; Pet. App. C. p.6)

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reaching its determination of the merits of petitioner's claim. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150 (2000).

[7] Hodges was fifty years of age at the time of trial. (4RR:77)

This evidence, especially the testimony that petitioner's supervisors rejoiced at the July 2004 pretextual complaint against petitioner, i.e. respondent's managers were ecstatic that **"we have got him,"** is dramatic evidence of age discrimination. This evidence is why the jury found willful age discrimination below.

Compare this evidence with this Court's holding in *Reeves* which held that a prima facie case with evidence of pretext is sufficient to uphold a finding of willful age discrimination. In *Reeves*, this Court found that the Fifth Circuit had improperly struck down a willful finding by disregarding critical evidence favorable to the plaintiff and failing to draw all reasonable inferences in plaintiff's favor thereby "impermissibly substitut[ing] its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 152-153. The Fifth Circuit opinion in the instant case displays the identical failing.

In addition, the Fifth Circuit opinion disregards a fundamental rule regarding the standard of review for pretextual discrimination claims. An appellate court's standard of review varies according to what facts the jury actually found at the trial court level.

This rule regarding the standard of review has been explicitly stated by this Court a number of times. Most explicitly in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), under Title VII, the Court reversed a Court of Appeals decision which held that rejection of a defendant's pretextual reasons for an

adverse employment action compelled judgment for the plaintiff. *St. Mary's Honor Center*, 509 U.S. at 511. The Court then stated that such a rejection permitted – but did not compel – a jury to infer the ultimate fact of intentional discrimination. *Id.*

The Court concluded, though, that the outcome in *St. Mary's* would have been different had the plaintiff there obtained a favorable finding from the jury instead of a negative one on the discrimination issue. The Court held in *St. Mary's* that under the proper standard of review if the plaintiff had received a favorable finding from the jury – as petitioner has here – that "rejection of the defendant's proffered reasons is enough at law to **sustain** a finding of discrimination[.]" (emphasis in original) *St. Mary's Honor Center*, 509 U.S. at 512.

This standard of review has been adopted for cases under the ADEA. *Reeves,* 530 U.S. at 148. It is also important to note, in this context, that *Gross* did not invalidate *Reeves*, in fact it was cited therein with approval. Yet the result and rationale of the Fifth Circuit's decision, that somehow *Gross* has changed the playing field in pretextual age discrimination claims analyzed under *McDonnell Douglas*, calls into question the standard of review for all age discrimination claims based on proof of pretext. It also disregards *Gross's* acknowledgment that plaintiffs' proof of intentional age discrimination may be either

direct or circumstantial. This was not the intent of this Court in *Gross*.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

TIMOTHY G. CHOVANEC*
DAVID FIELDING
LAURA HALLMON

FIELDING, PARKER &
HALLMON, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102
(817) 390-0300

Counsel of Record *Attorneys for Petitioner*

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10168

DAVID BOYD,

Plaintiff-Appellant,

versus

GUIDANT SALES CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:05-CV-1822

(Filed Aug. 21, 2009)

Before REAVLEY, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

David Boyd sued his employer, Guidant Sales Corporation ("Guidant"), under the Age Discrimination

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

in Employment Act ("ADEA"), alleging wrongful termination based on age. The jury answered "yes" to the following question: "Do you find . . . that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?" Pursuant to the verdict, the district court entered judgment for Guidant.

After briefing had been completed on appeal, the Supreme Court decided *Gross v. FBL Financial Services., Inc.,* 129 S. Ct. 2343 (2009), holding that "a mixed-motives jury instruction in a suit brought under the [ADEA] is never proper. . . ." *Id.* at 2346. This means that under the ADEA, a plaintiff must establish but-for causation: that his employer would not have terminated him but for his age. The jury's affirmative answer to the but-for interrogatory shown above dooms Boyd's chances of reversal or remand.

Even in light of Gross, Boyd argues for a new trial based on the jury's yes answers to the following questions:

> Do you find . . . that Plaintiffs age was a motivating factor in Defendant's decision to terminate Plaintiff's employment?
>
> Do you find . . . that Defendant wilfully violated the [ADEA] by discriminating against Plaintiff on the basis of age?

Those answers, however, satisfy only the now-repudiated mixed-motive theory of ADEA liability. Boyd has had his chance to convince a jury that he would not have been terminated but for his age, and

he is not entitled to a new trial to attempt to establish that element.

The judgment, albeit reached without benefit of Gross, is correct. The district court also did not abuse its discretion in its evidentiary rulings and did not err as a matter of law in regard to the remaining issues on appeal. The judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-10168

D.C. Docket No. 3:05-CV-1822

DAVID BOYD,

Plaintiff-Appellant

v.

GUIDANT SALES CORP,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Before REAVLEY, SMITH, and DENNIS, Circuit Judges.

JUDGMENT

(Filed Aug. 21, 2009)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: 14 SEP 2009

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DAVID BOYD,	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No.**
GUIDANT SALES CORPORATION,	§	**3:05-CV-1822-M**
	§	
	§	
Defendant.	§	

ORDER

(Filed Jan. 23, 2008)

Before the Court are Plaintiff David Boyd's Motion for New Trial, filed January 17, 2008, and Defendant Guidant Sales Corporation's Renewed Motion for Judgment as a Matter of Law, filed January 22, 2008. Having considered the Motion for New Trial, evidence and arguments presented at trial, and applicable law, the Court is of the opinion that the Motion for New Trial should be **DENIED**. As a result, Defendant's Renewed Motion for Judgment as a Matter of Law is **DENIED** as moot, as the Court entered a Judgment in favor of Defendant on January 8, 2008.

SO ORDERED.

DATED: January 23, 2008.

/s/ Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID BOYD, Plaintiff, vs. GUIDANT SALES CORPORATION, Defendant.	§ § § § § § § §	Civil Action No.: 3:05-CV-1822-M

JUDGMENT

(Filed Jan. 8, 2008)

On December 18, 2007, the jury rendered a Verdict in favor of Defendant on Plaintiff's claims. In light of the jury's verdict, it is **ORDERED**, **ADJUDGED**, and **DECREED** that Plaintiff take nothing on his claims against Defendant. Taxable court costs are to be paid by the Plaintiff.

SO ORDERED.

DATED: January 8, 2008.

/s/ Barbara M.G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DAVID BOYD,	§	
Plaintiff,	§	Civil Action No. 3:05-CV-1822-M
GUIDANT SALES CORP.,	§	
Defendant.	§	

COURT'S CHARGE TO THE JURY

(Filed Dec. 18, 2007)

MEMBERS OF THE JURY:

General Instructions

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you, the jury, are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case. The facts are for you to determine.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and do not constitute instructions on the law. They are intended only to assist you, the jury, in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

Throughout these instructions I will refer to the "Plaintiff" and the "Defendant." The Plaintiff, as you recall, is David Boyd, and the Defendant is Guidant Sales Corporation, or GSC.

You must answer all questions from a "preponderance of the evidence." By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. The Plaintiff has the burden of proof by a preponderance of the evidence, except where stated otherwise.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider his or her relationship to the Plaintiff or the Defendant; his or her interest, if any, in the outcome of the case; his or her manner of testifying; his or her candor, fairness and intelligence; his or her opportunity to observe or

acquire knowledge concerning the facts and whether his or her testimony has been supported or contradicted by other credible evidence. You may accept or reject the testimony of any witness in whole or in part.

A witness maybe "impeached", or discredited, by a showing that the witness testified falsely concerning some important fact, or by evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial. You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence – such as testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field, an expert witness, is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that the expert testifies regularly as an

expert witness and that the expert's income from such testimony represents a significant portion of that person's income.

In deciding the facts of this case, you must not be swayed by bias, prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

SPECIFIC INSTRUCTIONS

The Plaintiff has brought suit under the Age Discrimination in Employment Act of 1967 ("ADEA"), which prohibits discrimination in public and private employment against individuals 40 years of age and

older. The ADEA prohibits discrimination based on age with respect to any term, term [sic], condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The parties have agreed, or stipulated, to the following facts, which you must treat as true:

1. Defendant is an "employer" within the meaning of the ADEA, 29 U.S.C. § 630(b).

2. Defendant sells cardiovascular medical devices (i.e. pacemakers, implantable defibrillators and heart failure devices) for non-party Guidant Corporation ("Guidant").

3. Plaintiff was born on January 10, 1945.

4. Plaintiff worked as an independent sales representative (often called a "representative principal") for Intermedics, a manufacturer of pacemakers, during the 1980s and 1990s.

5. During his association with Intermedics, Plaintiff developed relationships in the Fort Worth area with doctors he assisted with implanting pacemakers into patients who needed them.

6. In 1999, non-party Guidant acquired Intermedics.

7. In connection with Guidant's acquisition of Intermedics, Defendant hired Plaintiff, who was then fifty-four (54) years old.

8. Plaintiff was an at-will employee of Defendant.

9. Plaintiff was largely successful in transitioning his Intermedics device business to Guidant device business.

10. As a sales representative for Defendant, Plaintiff sold bradycardia products (pacemakers), implantable cardio defibrillators (ICD or tachy products), and later, heart failure devices.

11. Pacemakers treat slow heart rates.

12. ICDs treat tachycardia or fast and erratic heart rates.

13. Initially, Plaintiff received primarily positive performance reviews.

14. Wendi Woolf worked for Defendant as the administrative assistant to Bill Boulter.

15. Cary Paulette was employed by Guidant Sales Corporation from July 1, 2003 until November of 2004.

16. Effective January 1, 2004, Cary Paulette became Plaintiff's regional manager.

17. On March 1, 2004, Roger Owens became Area Director with responsibilities for Plaintiff's area.

18. At the time of Plaintiff's termination, Margaret Martin was the Human Resources Manager for Defendant's central region, the region in which Plaintiff worked.

19. Plaintiff admits that Defendant received complaints from its employees and customers regarding his personality and attitude.

In this case, the Plaintiff must prove every essential part of his age discrimination claim under the ADEA by a preponderance of the evidence. If the proof fails to establish any essential part of the Plaintiff's age discrimination claim by a preponderance of the evidence, you should answer "no" to the question relating to whether Plaintiff's age was a motivating factor in Defendant's decision to terminate Plaintiff's employment.

The Plaintiff claims that the Defendant discriminated against the Plaintiff by discharging him because of his age. The Defendant denies Plaintiff's claims and contends that Plaintiff was terminated for legitimate, non-discriminatory reasons.

It is unlawful under the ADEA for an employer to discriminate against an employee forty years of age or older because of that employee's age. The elements of such a claim are the following:

1. That he was forty years of age or older at the time of discharge (this element is not in dispute);

2. That he was terminated (this element is not in dispute); and,

3. That his age was one of the reasons, but not the only reason, that the Plaintiff was terminated. Plaintiff must show by a preponderance of the evidence that age was a motivating factor in

Defendant's decision to terminate his employment at the time the decision to terminate his employment was made.

The term "motivating factor" means that Plaintiff's age contributed to Defendant's decision in a substantial way, or to put it another way, that Defendant would not have discharged Plaintiff if he had been under the age of forty and everything else remained the same. Remember, however, that the Plaintiff is not required to prove that age was the sole motivation or even the primary motivation for Defendant's decision to terminate the Plaintiff.

If you find by a preponderance of the evidence that the Plaintiff has disproved the reasons Defendant has given for Plaintiff's termination, you are permitted, but not required, to infer that the Defendant was motivated by age in terminating the Plaintiff. The ultimate burden of persuading the jury that Defendant intentionally discriminated against Plaintiff because of his age remains at all times with the Plaintiff.

Keep in mind that terminating an employee who is over the age of forty is not illegal if the reasons for doing so are unrelated to the employee's age. Therefore, the fact that Plaintiff is over the age of forty and that Defendant terminated his employment is not, in and of itself, sufficient under the law to establish his age discrimination claim.

You are instructed that the question is not whether Defendant made an erroneous decision. It is

whether the decision was made with a discriminatory motive. You may not return a verdict for Plaintiff just because you might disagree with Defendant's actions or believe them to be harsh or unreasonable. Under the law, employers of at-will employees are entitled to make independent employment decisions for any reason or no reason so long as the decision is not motivated by unlawful discrimination. You should not second-guess Defendant's decision or substitute your own judgment for that of Defendant. For example, if an employer reasonably believes a customer's complaint and acts on it in good faith, it is not necessary for the complaint to eventually be proved accurate for the employer to act on that complaint. Defendant was permitted to terminate Plaintiff's employment for any reason **other than his age**, whether that reason was good or bad, fair or unfair.

If you find that Plaintiff's age was a motivating factor in Defendant's decision to terminate Plaintiff's employment, even though other considerations were factors in the decision, then you must determine whether Defendant proved by a preponderance of the evidence that it would have made the same decision to terminate Plaintiff even if Defendant had not considered Plaintiff's age.

If you determine that the Defendant would have made the same decision regardless of Plaintiff's age, you must find for Defendant on this defense. On the other hand, if you determine that Plaintiff has proven that his age was a motivating factor in Defendant's decision to terminate him and that Defendant has not

proven that it would have made the same decision even had it not considered Plaintiff's age, then your verdict must be in favor of Plaintiff.

If you find Defendant terminated Plaintiff because of his age, then you must also determine whether Defendant's action was "willful." To establish willfulness, Plaintiff must also prove that, when Defendant terminated Plaintiff, Defendant either (a) knew that its conduct violated the ADEA, or (b) acted with reckless disregard for compliance with the ADEA.

If the Plaintiff has proven his age discrimination claim against the Defendant by a preponderance of the evidence, you must determine the damages to which the Plaintiff is entitled. You should not interpret the fact that I have given instructions about the Plaintiff's damages as an indication in any way that I believe that the Plaintiff should, or should not, win this case. It is your task first to decide whether the Defendant is liable for age discrimination. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendant is liable for age discrimination and that the Plaintiff is entitled to recover money from the Defendant.

If you decide to award damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of his losses with

mathematical precision, but only with as much definiteness and accuracy as the circumstances permit. You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

Back Pay

You may award as actual damages an amount that reasonably compensates Plaintiff for any lost wages and employment benefits Plaintiff would have received, had Plaintiff not been discriminated against, from the date of his termination (August 3, 2004) to the date of trial. This amount is called "back pay." You should deduct from this sum whatever wages Plaintiff has obtained from other employment during this same period, from the date of the discrimination to the date of this trial.

Front Pay

If you find that Plaintiff is reasonably certain to suffer damages in the future as a result of Defendant's actions, then you should award him the amount you believe would fairly compensate him for such future damages. Front pay is that amount of wages and employment benefits that Plaintiff would

have earned from and after the date of trial if he had not been subjected to the alleged unlawful conduct, less any wages and employment benefits he will receive from and after the date of trial.

For the purposes of back pay and front pay, "employment benefits" include sick-leave pay, vacation pay, profit-sharing benefits, stock options, pension fund benefits, housing or transportation subsidies, bonuses, and monetary losses incurred as a result of the loss of health, life, dental, or similar insurance coverage.

An award of future damages necessarily requires that payment be made now for a loss that Plaintiff will not actually suffer until some future date. If you should find that Plaintiff is entitled to future damages, including future earnings, then you must determine the present worth in dollars of such future damages.

If you award damages for loss of future earnings, you must consider two particular factors:

1. You should reduce any award by the amount of the expenses that the Plaintiff would have incurred in making those earnings.

2. If you make an award for future loss of earnings, you must reduce it to present value by considering the interest that Plaintiff could earn on the amount of the award if he made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount

representing future loss of earnings is more valuable to Plaintiff if he receives it today than if he received it in the future, when he would otherwise have earned it. It is more valuable because Plaintiff can earn interest on it for the period of time between the date of the award and the date he would have earned the money. Thus, you should adjust the amount of any award for future loss of earnings by the amount of interest that Plaintiff can earn on that amount in the future.

No Punitive or Exemplary Damages

If you determine Plaintiff is entitled to damages, in determining the amount of damages you may not include or add to the damages any sum for the purpose of punishing Defendant or serving as an example to warn others.

JURY QUESTIONS

Question No. 1

Do you find from a preponderance of the evidence that Plaintiff's age was a motivating factor in Defendant's decision to terminate Plaintiff's employment?

Answer "yes" or "no."

Answer: yes

If you answered "yes" to Question No. 1, proceed to answer Question No. 2. If you answered "no" to Question No. 1, do not answer any further questions.

Question No. 2

Do you find from a preponderance of the evidence that Defendant willfully violated the Age Discrimination in Employment Act by discriminating against Plaintiff on the basis of his age?

Answer "yes" or "no."

Answer: yes

Proceed to Question No. 3.

Question No. 3 (Defendant's burden)

Do you find from a preponderance of the evidence that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?

Answer "yes" or "no."

Answer: yes

If you answered "yes" to Question No. 3, do not answer any further questions. If you answered "no" to Question No. 3, proceed to Question No. 4.

Question No. 4

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for his damages, if any, that resulted from such conduct? Do not include interest on any amount of damages

you may find. Answer in dollars and cents for damages, if any, limited to back pay and front pay.

a. Back Pay

Answer: $_____

b. Front Pay

Answer: $_____

POST-ARGUMENT INSTRUCTIONS

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Do not speculate on matters that are not in evidence. Keep constantly in mind that it would be a violation of your own sworn duty to base a verdict on anything but the evidence in the case. Your answers and verdict must be unanimous; that is, all of you must agree to each of your answers. You will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if

you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

The fact that I have given you instructions about a particular claim or defense, or that I have not so instructed you, should not be interpreted by you in any way as an indication that I believe a particular party should, or should not, prevail in this case. It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury.

Remember that in a very real way you are the judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

You will now retire to the jury room. In a few minutes I will send you this charge and the exhibits the Court has admitted into evidence. Upon receiving the exhibits and charge, you should select a Foreperson and commence deliberations. Do not deliberate unless all of you are present in the jury room. In other words, if one or more of you go to lunch together or are together outside the jury room, do not discuss the case.

After you have reached your unanimous verdict, your Foreperson must fill in your answers to the written questions and sign and date the verdict form. Unless I direct you otherwise, do not reveal your answers until such time as you are discharged. You

must never disclose to anyone, not even to me, your numerical division on any question.

During your deliberations you will set your own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long.

If during the course of your deliberations you wish to communicate with the Court, you should do so only in writing by a note signed by the Foreperson and given to the Court Security Officer. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with respect to any message or question you might send, that you should never state or specify your numerical division at the time unless I specifically instruct you.

After you have reached your verdict, you will return this charge together with your written answers to the foregoing questions. Do not reveal your answers to anyone besides other members of the jury until such time as you are discharged, unless otherwise directed by me.

Your Foreperson will sign in the space provided on the following page after you have reached your verdict.

DATED: December 17, 2007.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing questions as indicated, and herewith return the same into Court as our verdict.

Dated: December 18, 2007.

/s/ Willie Minor
Foreperson

APPENDIX F

2007 WL 415328 (N.D.Tex.)

United States District Court,
N.D. Texas,
Dallas Division.
David BOYD, Plaintiff,
v.
GUIDANT SALES CORPORATION, Defendant.
Civil Action No. 3:05-CV-1822-M.

Feb. 7, 2007.

David Fielding, Lori Sherwood, Fielding Parker & Hallmon, Fort Worth, TX, for Plaintiff.

Edward L. Friedman, Locke Liddell & Sapp, Houston, TX, Kelly J. Thurman, Locke Liddell & Sapp, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

BARBARA M.G. LYNN, United States District Judge.

Before the Court is Defendant's Motion for Summary Judgment. Having considered the motion, briefs, and supporting evidentiary submissions of all parties, and for the reasons set forth below, the Court concludes that a genuine issue of material fact exists as to Plaintiff's claims against Defendant and therefore Defendant is not entitled to summary judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment should be **DENIED**.

Background

Plaintiff David Boyd was fired from his position as a sales representative for Defendant Guidant Sales Corporation ("Guidant") on August 2, 2004, at the age of 59. In its termination memorandum to Plaintiff, Guidant's Reigional [sic] Manager, Cary Paulette, cited Plaintiff's "continuation of unprofessional behavior, discontent from both internal and external customers and [Plaintiff's] failure to maintain acceptable level of performance" as the reasons for his termination.

As a sales representative, Plaintiff sold bradycardia products (pacemakers), implantable cardio defibrillator products (ICD or tachy), and heart failure devices. Plaintiff began working in the industry in 1976, first with a company called Medtronic and then with a company called Intermedics. Plaintiff was an independent sales representative for Intermedics operating through his own corporation, Cardiovascular Technology, Inc. ("CTI"). In February 1999, Defendant bought out Intermedics and, with a deal involving $640,000 and 10,000 shares of Defendant's stock, hired Plaintiff and acquired CTI's goodwill.

On September 13, 2005, Plaintiff filed his Complaint in this case, alleging claims under the Age Discrimination in Employment Act ("ADEA") and Texas Commission on Human Rights Act. Defendant filed its Motion for Summary Judgment on October 5, 2006, claiming that it had legitimate, non-discriminatory reasons for terminating Plaintiff's employment,

namely Plaintiff's allegedly inappropriate behavior towards co-workers, customers, and customers' patients.[1] Defendant first addressed these issues with Plaintiff in a 60-day performance improvement plan ("PIP") issued on August 5, 2002, precipitated by a complaint lodged on July 26, 2002 by a nurse and a patient's family for his allegedly rude and insensitive demeanor.

Although Plaintiff successfully achieved the goals outlined in that first PIP, Defendant placed Plaintiff on a 30-day evaluation and final warning on March 1, 2004. Defendant's Regional Manager, Bill Boulter, advised Plaintiff that Defendant had received complaints from customers regarding Plaintiff's customer service and that Plaintiff was failing to use company computer programs properly.

The event that resulted in Plaintiff's firing occurred on July 30, 2004, and concerned the "continuation of unprofessional behavior [and] discontent from both internal and external customers," cited by Defendant in its termination memorandum to Plaintiff. Katie Chapman, a nurse at Fort Worth Heart,

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[1] Plaintiff claims that Defendant "set him up to fail by setting unreasonable and unobtainable sales goals." The arguments regarding the sales goals, however, are not relevant to the Defendant's Motion for Summary Judgment because Defendant is not claiming to have based its termination of Plaintiff's employment on Plaintiff's failure to reach these goals. *See* Defendant's Brief in Support of Its Motion for Summary Judgment at 20.

called Plaintiff to ask about a malfunctioning device. The evidence shows that Plaintiff refused to go check the device and told the nurse to send the patient to the clinic instead. Nurse Chapman then called Defendant's technical consultants to ask for help but was reluctant to identify Plaintiff as the unhelpful sales representative. When the technical consultant contacted Plaintiff, Plaintiff "was very irate" and demanded to know who called in with the complaint. When the technical consultant identified Nurse Chapman as the caller, the technical consultant reported that Plaintiff stated, "I'm gonna call that bitch back and set her straight, this is bullshit." After inquiry from Plaintiff's supervisor, other employees at Fort Worth Heart registered complaints about Plaintiff's demeanor and attitude.

Summary Judgment Standard

Summary judgment is warranted when the facts as shown in the pleadings, affidavits, and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Pourgholam v. Advanced Telemarketing Corp.,* No. 3:01-CV-2764-H, 2004 Westlaw 1283963, at *2-3 (N.D. Tex. June 9, 2004). "The moving party bears the initial burden of identifying those

portions of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Props., Inc. v. Potomac Ins. Co.,* 140 F.3d 622, 625 (5th Cir.1998) (citing *Celotex,* 477 U.S. at 322-25). Once the movant carries its initial burden, the burden shifts to the nonmovant to show that summary judgment is inappropriate. *Fields v. City of S. Houston,* 922 F.2d 1183, 1187 (5th Cir.1991).

The nonmovant is then required to go beyond the pleadings and designate specific facts proving that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). That party may not rest on conclusory allegations or denials in its pleadings that are unsupported by specific facts. FED. R. CIV. P. 56(e). The court must review all evidence in the record, giving credence to evidence favoring the nonmovant as well as "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses," and disregarding the evidence favorable to the movant that the jury would not be required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 152, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Further, "the court must draw all justifiable inferences in favor of the nonmovant." *Keelan v. Majesco Software, Inc.,* 407 F.3d 332, 338 (5th Cir.2005) (citing *Bodenheimer v. PPG Indus., Inc.,* 5 F.3d 955, 956 (5th Cir.1993)).

In determining whether genuine issues of material fact exist, "factual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists." *Lynch,* 140 F.3d at 625. "If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.,* 948 F.2d 972, 974 (5th Cir.1991). However, in the absence of proof, a court will not conclude that the nonmoving party could prove the required facts. *Lynch,* 140 F.3d at 625. Further, the party opposing summary judgment must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586.

Analysis

I. Standard to Apply in Age Discrimination Case

The standard the Court applies in an age discrimination case such as this one depends upon the type of evidence presented by the plaintiff. If the plaintiff presents direct evidence of discrimination, then "the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor." *Fierros v. Tex. Dep't of Health,* 274 F.3d 187, 192 (5th Cir.2001) (internal quotation omitted). If the plaintiff presents only circumstantial evidence, then the court applies a modified *McDonnell Douglas* framework:

> [T]he plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motives alternative).

Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir.2004). "[I]n order for comments in the workplace to provide sufficient evidence of discrimination, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Krystek v. Univ. of S. Miss.*, 164 F.3d 251, 256 (5th Cir.1999) (internal quotation omitted).

II. Plaintiff's Summary Judgment Evidence

In support of his claim of age discrimination, Plaintiff has presented three principal exhibits: excerpts from his deposition and the affidavits of Robert Hodges and Cary Paulette. The Court will consider these pieces of evidence in turn to determine whether

Plaintiff has presented evidence of age discrimination and, if so, whether that evidence is direct or circumstantial.

A. Plaintiff's Deposition

Plaintiff points to statements made on two separate occasions as evidence of age discrimination. First, Plaintiff alleges that Spencer Williamson and Steve Knight asked Plaintiff in October 1998, when Plaintiff was 53 years old, how long Plaintiff was planning to work. Depo. at 71-72; App. 9-10. Plaintiff also alleges that after Plaintiff had a heart attack in 2002, Bill Boulter offered to buy him out, but that Plaintiff refused the offer because he wanted to continue to work while his children were in college. Depo. at 72-73; App. 10-11.

Neither of these allegations provide sufficient evidence of discrimination, pursuant to the test set out in the *Krystek* opinion. The comments were not made proximate in time to the termination, which occurred in 2004, and were not made by an individual with authority over the employment decision. Furthermore, Plaintiff has failed to show how these comments are at all related to the employment decision at issue. The excerpts from Plaintiff's deposition are neither direct nor circumstantial evidence of age discrimination.

B. Hodges and Paulette Affidavits

Plaintiff relies on the following paragraph in Robert Hodges's affidavit as evidence of age discrimination:

> In June or July of 2004, while I was in Guidant's Dallas office, I overheard a conversation between Roger Owens, Area Director, and Cary Paulette, Regional Manager, about Dave Boyd's then recent heart attack. Roger Owens was complaining that Dave Boyd sure had a lot of health problems. Roger Owens also expressed discontent about Dave Boyd's age and was questioning Cary Paulette about how much longer Dave Boyd was going to be around and working.

Plaintiff's App. 45, ¶ 5.

Plaintiff draws the Court's attention to several statements in the Affidavit of Cary Paulette, who was Plaintiff's direct supervisor from January 1, 2004, until Plaintiff's termination in August 2004, as evidence of age discrimination:

- "Roger Owens told me that he wanted Dave Boyd 'out of here' and to document everything so when the time came, he could get rid of Dave Boyd." Plaintiff's App. 63, ¶ 9.
- "Roger Owens began targeting certain individuals, all over the age of forty for unfavorable employment actions. He said they were making too much money

and we could 'hire younger people who were cheaper.'" Plaintiff's App. 63, ¶ 10.

- "In June or July of 2004, while I was in Guidant's Dallas office, Roger Owens complained to me about Dave Boyd's then recent and second heart attack and about Dave Boyd's health problems. Rogers Owens also expressed discontent about Dave Boyd's age and questioned me about how much longer I thought Dave Boyd was going to be around and working." Plaintiff's App. 64, ¶ 16.

- "In a meeting I attended, Roger Owens complained openly, 'for what I'm paying one Bob Hodges, I can have two 25 year old FCRs who will work for me 24 hours a day, seven days a week without thinking twice about it.' At that time Bob Hodges was a Guidant sales rep who was over forty years of age." Plaintiff's App. 65, ¶ 18.

- "Even though I felt Dave Boyd was doing a good job at Guidant, I was pressured by Roger Owens to give Dave Boyd negative personnel evaluations." Plaintiff's App. 65, ¶ 19.

- "Looking back, I believe there was an age related theme at Guidant, since the people who were targeted for negative employment actions, including termination, were all over forty years of age and the people hired were under thirty-two years of age." Plaintiff's App. 65, ¶ 23.

Plaintiff has produced evidence of age discrimination. The statements made by Roger Owens, which are reflected in paragraphs 10, 16, and 18 of Paulette's affidavit and paragraph 5 of Hodges's affidavit, all relate to the protected class of persons of which Plaintiff is a member. Though paragraphs 10 and 18 do not contain a date, it may logically be concluded that these comments were made within eight months of Plaintiff's termination, since Roger Owens became Area Director in early 2004. *See* Plaintiff's App. 63, Paulette's Affidavit at ¶ 5. The statements referenced in paragraphs 5 and 16 was made within one or two months of Plaintiff's termination. All of the comments were allegedly made by Roger Owens, the area director who had authority over Plaintiff's employment and, according to the summary judgment evidence, instructed Paulette to terminate Plaintiff's employment. *See* Plaintiff's App. 65, Paulette's Affidavit at ¶ 24. Paragraphs 5 and 16 relate to the particular employment decision at issue.

All these allegations taken together constitute direct evidence of a general hostility to older workers, including Plaintiff, and of a desire to terminate their employment, and circumstantial evidence that termination of Plaintiff's employment was based, at least in part, on that animus. These statements do not constitute direct evidence of discriminatory animus since, if believed, these statements still do not prove the fact of discriminatory animus in the termination decision without inference or presumption. *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858 (5th

Cir.1993). Plaintiff's evidence is similar in kind to the evidence evaluated in *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir.1995). In *Mooney*, the trial plaintiffs complained of statements made by their supervisors regarding company policy "to get rid of the older employees with the higher salaries" and statements that certain employees had "a good case against Aramco for age discrimination." *Id.* at 1219. The court held that while these statements constituted circumstantial evidence of discriminatory animus, the statements were not direct evidence of discrimination since inferences had to be drawn to reach the conclusion that the defendant "actually relied on" the plaintiffs' ages in terminating their employment. The Court finds that Plaintiff's evidence is likewise circumstantial, but not direct, evidence that termination of Plaintiff's employment was based on discriminatory animus.

Defendant argues that Paulette's affidavit is not competent summary judgment evidence, intimating that Paulette's testimony has been influenced by an alleged grudge he holds against Defendant since his own termination. This argument, however, goes to the weight, and not the admissibility, of the evidence and should be left for the jury to determine.

Defendant also argues that the comments made about Plaintiff's health are not proper evidence of discriminatory animus. The cases Defendant cites for this proposition, however, do not hold that comments about health can never be associated with age discrimination. *See Dockins v. Benchmark Commc'ns,*

176 F.3d 745, 749 (4th Cir.1999) (employer's mention of plaintiff's health "not surprising . . . since [plaintiff] had on several occasions approached [employer] to ask for time off due to illness"); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1166 (comments about heart problems in personnel file not evidence of discriminatory animus since "[h]eart problems . . . may arise at any age"). Since the evidence in this case associates health problems with comments about the Plaintiff's age, these cases are not applicable.

III. Application of Standard

Since Plaintiff has presented circumstantial evidence of discrimination as part of its summary judgment proof, the Court will apply the modified *McDonnell Douglas* framework. First, Plaintiff has presented a prima facie case of age discrimination. Plaintiff has produced evidence that he was within the protected group at the time he was fired, that he was qualified to perform his job duties at the time of his termination, and that he was replaced by a younger individual with less experience than Plaintiff. Defendant does not contest that Plaintiff has established a prima facie case of age discrimination. *See* Defendant's Brief in Support of Its Motion for Summary Judgment at 9.

Defendant has articulated a legitimate, nondiscriminatory reason for its decision to terminate Plaintiff: the numerous complaints it received from its employees and customers regarding Plaintiff's

personality and attitude. Plaintiff does not deny that Defendant received these complaints and therefore is unable to establish that Defendant's stated reason for the termination was a pretext for discrimination.

However, Plaintiff has presented competent summary judgment evidence in the form of the Hodges and Paulette affidavits to create a genuine issue of material fact that Defendant's reason for the termination, while true, is only one of the reasons for its conduct, and another 'motivating factor' was Plaintiff's age. The Court finds that the statements referenced in these affidavits were "1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Krystek v. Univ. of S. Miss.*, 164 F.3d 251, 256 (5th Cir.1999). The Court therefore finds that summary judgment is not appropriate since Plaintiff has established a genuine issue of material fact that Plaintiff's age was a motivating factor for Defendant's termination of Plaintiff's employment.

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED** in its entirety.

SO ORDERED.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID BOYD,	§	
PLAINTIFF	§	
	§	
V.	§	**CIVIL ACTION**
	§	**NO. 3-05-CV-1822-M**
GUIDANT SALES CORPORATION,	§	
	§	
DEFENDANT	§	

PLAINTIFF'S MOTION FOR NEW TRIAL AND BRIEF IN SUPPORT THEREOF

Now comes David Boyd, Plaintiff herein, (hereinafter "Boyd" or "Plaintiff") pursuant to Rule 59 of the Federal Rules of Civil Procedure, to request amendment of the judgment entered herein to award Boyd his attorney's fees and court costs and, in addition, a new trial on damages and liquidated damages only, and for same would show the Court as follows:

I. Introduction

1. Plaintiff's name is David Boyd.

2. Plaintiff sued defendant for age discrimination under the Age Discrimination in Employment Act.

3. After a trial on the merits, the court submitted the case to the jury.

4. The jury returned a verdict.

5. The clerk entered judgment on January 8, 2008. Plaintiff files this motion on January 17, 2008 which is within ten working days after the entry of judgment.

II. Procedural History

On or about December 18, 2007, the jury returned its verdict in the above styled and numbered cause. In its verdict, the jury determined that Guidant Sales Corp. had willfully violated the Age Discrimination in Employment Act (hereafter "ADEA") by discriminating against Boyd on the basis of age. This finding, along with the jury's determination that Boyd's age was a motivating factor in Guidant's decision to terminate Boyd's employment, established Boyd as the prevailing party in the litigation, thereby entitling him to judgment as a matter of law in this case.

This Court improperly entered a take-nothing judgment against Boyd on or about January 8, 2008. This action denied Boyd both damages and attorney's fees herein, the latter being statutorily mandatory where the plaintiff has prevailed under the ADEA. The Court's entry of a take-nothing judgment precludes Boyd from presenting his evidence of attorney's fees which, pursuant to the Court's Pre-Trial Order, were to be presented by the parties post-judgment.

Therefore, the purpose of this Motion is to request the Court to withdraw its take-nothing judgment and to enter a substantively correct judgment in its place or, in the alternative, to withdraw its take-nothing judgment and grant Boyd a new trial based upon the Court's errors of law, both pre-verdict and post-verdict, as hereinafter described.

III. The Erroneous Jury Charge

The United States Supreme Court has never authorized the submission of a "mixed-motives" jury charge in an ADEA case. Therefore, under the express terms of the ADEA, Boyd is entitled to recover damages, liquidated damages and attorney's fees because of Guidant's willful discrimination against him on the basis of age. 29 U.S.C. § 626(c)(1). But see *Rachid v. Jack In the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). As a result of the express wording of the statute, therefore, the jury's answer to question 3 of the jury charge, which was objected to by Boyd prior to its submission to the jury, was immaterial and should be disregarded.

Should this Court determine there was no error is the submission of the jury charge, Boyd respectfully requests this Court to: 1) assess the value of Boyd's attorney's fees, (see Affidavit of David Fielding attached hereto as Exhibit "A,") and 2) explicitly state the statutory interpretation upon which it relies – including but not limited to whether attorney's fees are precluded as a matter of fact or law – to allow the

simultaneous incorporation of the "mixed motive" affirmative defense from Title VII and the disregard of the mandatory attorney fee provisions of the ADEA for statutory violations. Boyd contends that the take-nothing judgment represents an interpretation which violates the rules of statutory construction applicable under federal law to the ADEA.

Further, the failure to award attorney's fees and costs to Boyd based upon the willful discrimination by Guidant under the ADEA under the theory that the jury's answer to question 3 preempts the jury's answers to questions 1 and 2 is a violation of Boyd's constitutional right to trial by jury and his right to due process as guaranteed by the United States Constitution. This Court's interpretation of *Rachid v. Jack In the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004),[1] as depriving Boyd of damages and attorney's fees and costs herein, is unconstitutional because it gives Guidant "two bites at the apple." Nothing in the ADEA deprives Boyd of recovery of damages, liquidated damages and attorney's fees once he has obtained favorable findings on his motivating factor and willful discrimination questions.

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[1] Unlike the case at bar, *Rachid* was a summary judgment case in which the plaintiff did not contest the applicability of a "mixed-motive" analysis to his ADEA claim See *Rachid*, 376 F.3d at 310. Boyd believes this Court's construction of *Rachid* and its application in a jury trial setting to Guidant's argument of entitlement to judgment, based upon "mixed-motive" analysis in an ADEA claim, is a question of first impression in this Circuit.

IV. Attorney's Fees Are Mandatory Under the ADEA

Unlike Title VII, where the court retains some discretion, an award of reasonable attorney's fees and costs to a prevailing plaintiff under the ADEA is mandatory. See, e.g. *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133, 142 (2d Cir. 2007); *Eddleman v. Switchcraft, Inc.*, 927 F.2d 316, 317 (7th Cir. 1991); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983); *Detje v. James River Paper Corp.*, 167 F.Supp. 2d 248, 250 (D. Conn. 2001). The reason for the difference arises from the use of the word "shall" in *29 U.S.C. § 216(b)* as compared with the use of the word "may" under *42 U.S.C. § 2000e-5(k)*.

The starting point for the interpretation of a statute is always the express language of the statute itself. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). The courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *Smith v. City of Jackson*, 351 F.3d 183, 188 (5th Cir. 2003); *Shah v. Chertoff*, 2006 WL 2859375, p.5.

Under these well established principles of statutory construction, two things are clear from a simple reading of the ADEA, *29 U.S.C. § 620, et seq.*: 1) Guidant is not entitled to a "mixed-motive"

affirmative defense submission in an ADEA case; and 2) Boyd, based upon favorable jury findings on motivating factor and willfulness, is entitled to judgment on the merits as a matter of law.[2]

---

[2] In the alternative, should this Court determine that, despite Boyd's objection, Guidant was entitled to submit its "mixed-motive" question to the jury under the ADEA, the jury's finding in that regard does not vitiate Guidant's liability for Boyd's attorney's fees and expenses under the express provisions of *29 U.S.C. 216(b)* which states that in cases where an employer violates the ADEA, "The court in such action ***shall***, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." See *29 U.S.C. § 626(b)* which incorporates the provisions of *29 U.S.C. 216(b)* into the ADEA.

Boyd anticipates that Guidant will attempt to incorporate, like the "mixed-motive" concept, Title VII's "prevailing party" analysis. See *42 U.S.C. § 2000e-5k* and *42 U.S.C. § 1988(b)*. As one federal court has commented, however, "the structure and relevant language of the ADEA are significantly different than those of the analogous sections of either Title VII or § 1988(b). The substitution of the phrase "any judgment" for "prevailing party" is an important modification, and I believe it warrants a different analysis." *Salvatori v. Westinghouse Electric Corporation*, 190 F.3d 1244, 1247 (11th Cir. 1999) (Judge Bright concurring). Even under Title VII following the 1991 amendments, courts have held that the recovery of damages is not a proper factor upon which to assess the propriety of granting a fee award in a mixed-motive case and that fees should be awarded in all "but special circumstances." *Gudenkauf v. Stauffer Communications*, 158 F.3d 1074, 1085 (10th Cir. 1998) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 (1994).

Here, though, the ADEA unambiguously entitles Boyd to attorney's fees, without any reference to a requirement that Boyd meet any definition of "prevailing party."

V. Equitable Attorney's Fees

In the alternative, this Court should award Boyd his attorney's fees under equitable principles, which Boyd specifically pled. (See Original Complaint at p. 4). See e.g. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L. Ed. 2d 702 (1973); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989). This is particularly appropriate here because the ADEA explicitly authorized this Court to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter," which include "to effect voluntary compliance" with the ADEA. *29* U.S.C. § *626(b)*. In addition, Boyd's jury found Guidant's discrimination on the basis of age was willful. To condone or forgive such misbehavior in no way effectuates the purposes of the ADEA.

VI. The Trial Court's Erroneous Evidentiary Rulings Caused the Rendition of An Improper Judgment

In the alternative, the failure of this Court to allow direct evidence of discriminatory actions and intent herein, attributable to both Guidant generally and the key decision-maker specifically, has caused the rendition of an improper judgment and entitles Boyd to a new trial on all issues. Had the jury been allowed to hear such evidence, Boyd would have been entitled to a "no" answer to question 3 as a matter of law.

This Court abused its discretion in reaching that result based upon its erroneous application of the decision in *Wyvill v. United Companies Life Insurance Company*, 212 F.3d 296 (5th Cir. 2000). Instead, the Court should have applied *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed. 2d 105 (2000) as interpreted by the Fifth Circuit in *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003). This clear error of law caused the rendition of an improper judgment.

PRAYER

Wherefore, premises considered, Boyd respectfully requests that this Court set a hearing on this Motion and upon hearing and argument rescind its take-nothing judgment; that the court enter a judgment in Boyd's favor awarding him his attorney's fees; that the court grant Boyd a new trial on damages, liquidated damages and additional attorney's fees and costs; in the alternative, Boyd respectfully requests that this Court issue an opinion in writing after hearing and arguments of counsel and for such other and further relief to which Boyd may be justly entitled.

Respectfully submitted,

/s/ David Fielding
David Fielding
Attorney-in-Charge
Texas Bar Number 06974500

Laura Hallmon
Texas Bar Number 24004312

FIELDING, PARKER &
HALLMON, L.L.P.
314 Main Street, Suite 300
Fort Worth, Texas 76102
Telephone: (817) 390-0300
Telecopy: (817) 390-0310
E-mail: dfielding@fphlaw.com
E-mail: lhallmon@fphlaw.com

ATTORNEYS FOR
DAVID BOYD, PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that on January 17, 2008, the foregoing was electronically filed with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented to accept said Notice as service of this document by electronic means:

Edward L. Friedman
Locke Liddell & Sapp LLP
3400 JPMorgan Chase Tower, 600 Travis
Houston, Texas 77002

Kelly J. Thurman
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201

/s/ David Fielding
David Fielding

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DAVID BOYD,	§	**CIVIL ACTION NO.**
PLAINTIFF	§	**3:05-CV-1822-M**
	§	
V.	§	
GUIDANT SALES CORPORATION,	§	
	§	
DEFENDANT	§	

AFFIDAVIT SEEKING AWARD OF ATTORNEY'S FEES AND COSTS

(Filed Jan. 17, 2008)

STATE OF TEXAS §
§
COUNTY OF TARRANT §

Before me, the undersigned authority, on this day personally appeared David Fielding, personally known to me, and first being duly sworn, upon his oath, stated:

> My name is David Fielding. I am a duly licensed attorney practicing law in the State of Texas. I am a partner in the Fort Worth Texas law film of Fielding, Parker & Hallmon, L.L.P., attorneys for the plaintiff in the above-entitled and numbered cause. I am over the age of 21 years of age, of sound mind, capable of making this affidavit, and

fully competent to testify to the matters stated in this affidavit. I have personal knowledge, of each of the matters stated herein, and they are all true and correct.

I was licensed to practice law in 1974 and have continued to practice law in Texas since that time. In the 33 years of my practice, I have devoted a significant percentage of my time to the practice of civil litigation of commercial claims and labor and employment claims in cases dealing with a variety of issues. Based upon these years of experience, I am familiar with the rates charged by attorneys in the North Central Texas area in such cases. I have engaged in litigation on both side of the docket in a number of cases over the years dealing with issues related to age discrimination. I would also state that the case of *Boyd v. Guidant Sales Corporation* required a significant knowledge of employment law and litigation in order to be competently handled.

We first met with the Plaintiff, David Boyd, on August 19, 2004, and, after meeting with him and learning his facts, I decided to accept his representation and, in keeping with my standard practice in litigation cases, I assigned another lawyer and a legal assistant from nay office to work with me on the file. At that time, my standard billing rate was $360/hour. The associate I assigned to the file, Nathan Schattman, is also a licensed attorney who had been practicing law with me since 1995. He was licensed to

practiced in 1994, and spent the first year of his practice as a briefing attorney for the Fort Worth Court of Appeals. He had devoted the vast majority of his practice to civil litigation. The legal assistant I assigned to work on this file originally was Pam Vire, who has been working as a legal assistant with our office since June 25, 1990. At the time I assigned her to this case, she had 23 years of experience as a legal assistant. When Mr. Schattman left our firm in February of 2005, I assigned Lori Sherwood to take his place. Ms. Sherwood worked on the file until she began a pregnancy leave in September of 2006. Thereafter, I asked my partner, Laura Hallmon, to work on the file in Ms. Sherwood's place. Ms. Sherwood was licensed to practice law in 2000 and had a good deal of litigation experience before she joined our firm. Ms. Hallmon was licensed to practice in 1999 and has worked in our firm since law school, handling labor and employment litigation. Mr. Schattman, Ms. Sherwood, Ms. Hallmon and Ms. Vire were well qualified to work with me in the handling of Mr. Boyd's case.

After I accepted representation in the file, I began to work on the file personally. In 2005, my standard billing rate was increased to $375/hour, and, on January 1, 2006, my standard billing rate increased to $385/hour. Subsequently, on January 1, 2007, my standard billing rate became $395.00 per hour. Similarly, the standard billing rates of the others who have worked on this case

have changes over the years this case has been in our office, and at all times, the rates we charged for each timekeeper's time to this file was that timekeeper's standard billing rate at the time the work was performed. When Mr. Schattman was first assigned to work on this file, his standard billing rate was $210/hour. When Ms. Vire was assigned to work on this file, her standard billing rate was $130/hour. Her rate changed to $135 per hour in January of 2005, $145 per hour in January of 2006, and $155 per hour in January of 2007. Ms. Sherwood's initial rate was $190 per hour, and that rate increased to $200 per hour in January of 2005, and to $210 per hour in January of 2006. Ms. Hallmon's initial rate was $250 per hour, and it increased to $270 per hour in 2007.

At the time this file came into our office, I recognized that it would be significant, hard-fought litigation requiring a lot of staff. We recognized that the Defendant would have outstanding legal assistance from Mr. Friedman and his firm and that they would contest virtually every legal issue. Our legal assistant was carefully supervised by the other lawyers and me during the life of this file. This lawsuit involved several distinct legal theories including age discrimination and a "mixed motives" argument by the Defendant. I have reviewed the file to determine the reasonable and necessary attorney's fees that have been incurred on Mr. Boyd's behalf, and I have deducted

duplicative fees related to the departure of Mr. Schattman and Ms. Sherwood from our firm.

The following chart sets forth the charges for court costs in this case from its inception through trial:

Item	Amount
Fees of the Clerk (Filing of Original Complaint)	$250.00
Fees for Service of Summons and Subpoena (Service of Complaint)	80.00
Fees of the Court Reporter for all or any part of the transcript necessarily obtained for use in this case (certified copy of David Boyd's deposition)	548.70
Fees for witnesses ($40.00 witness fee for Carey Paulette, Sue Virdell and Robert Hodges)	120.00
Fees for copies of papers necessarily obtained for use in this case	753.40
Other Costs:	
1. Mediation Fee	800.00
2. Expert Fees (Dave Hardin)	4,302.00
TOTAL	$6,854.10

The following chart sets forth the total time and charges (at our standard billing rates) of those in our firm who worked on this case from its inception through trial:

	Hours	Amount
David Fielding	280.05	$109,914.39
Nathan Schattman	4.5	945.00
Laura Hallmon	154.25	41,530
Pamela Vire	465.50	69,838.85
Lori Sherwood	121.25	24,575.96
SUB TOTAL		$246,804.20
Reduction for duplication of effort		25,000.00
TOTAL: Fees claimed for this litigation		$221,804.20

Based upon all of the above, it is my opinion that reasonable and necessary attorney's fee for representing Mr. Boyd from the inception of the file through trial comes to $221,804.20.

In addition, based upon my experience, I am of the opinion that the following amounts reflect reasonable attorneys' fees and expenses for each of the following stages of post-judgment review for the contract claims.

1. Post verdict and judgment motions and hearings $ 20,000.00
2. In the event a motion for new trial is filed, but denied. $ 5,000.00
3. In the event an appeal to the Court of Appeals is made:
   a. With oral argument $ 40,000.00
   b. Without oral argument $ 20,000.00

4.	In the event a petition for writ of certiorari is filed with the United States Supreme Court:	$ 15,000.00
9.	In the event a petition for writ of certiorari is granted by the United States Supreme Court	$ 15,000.00

Except where they are expressly indicated to be alternatives, the above-referenced appellate attorney's fees are cumulative. It is my testimony that the attorney's fees set forth herein were and are reasonable and necessary in the representation of the plaintiff in this case, and I respectfully request that the court award attorney's fees as set forth in this affidavit. In my opinion, the time spent in this case by the firm of Fielding, Parker & Hallmon, L.L.P. has been and will continue to be commensurate with the size and complexity of the issues involved and the nature of the demands placed upon the plaintiff's attorneys by the efforts of the defense counsel in this case. Time spent on this case also kept attorneys in our firm from spending time on other assignments that would have otherwise been accomplished.

In my opinion, all of the services rendered to Mr. Boyd were necessary in the representation of Mr. Boyd, and all of the charges were reasonable charges in Tarrant County, Texas at the time and place where the services were provided.

/s/ David Fielding
David Fielding

Subscribed and sworn to me this 17th day of January, 2008, to certify which witness my hand and official seal.

(SEAL)
PAMELA SIMPSON VIRE
Notary Public
State of Texas
My Commission Expires
December 17, 2008

/s/ Pamela Simpson Vire
Notary Public in and
for the State of Texas

My commission expires
12-17-08

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

No. 09-602

IN THE
Supreme Court of the United States

DAVID BOYD,

Petitioner,

v.

GUIDANT SALES CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

KIRSTEN M. CASTAÑEDA
Counsel of Record
EDWARD L. FRIEDMAN
KELLY J. THURMAN
LOCKE LORD BISSELL & LIDDELL L.L.P.
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000

Attorneys for Respondent

227624

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), this Court clarified the proper standard for establishing a violation of the Age Discrimination in Employment Act (ADEA). A showing that age was a motivating factor in the termination decision is *not* sufficient to establish discrimination. 129 S.Ct. at 2349, 2350. Instead, age must rise to the level of the "but-for" cause of the employer's adverse decision. *Id.* at 2350.

At the trial of David Boyd's ADEA claim, the jury answered three questions. The first two questions asked whether Boyd's age was a motivating factor in Guidant's decision to terminate Boyd's employment, and whether Guidant's discrimination was willful. The third question asked:

> Do you find from a preponderance of the evidence that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?

The jury answered all three questions "Yes." By answering the third question "Yes," the jury essentially found that age did not rise to the level of the "but-for" cause of Boyd's termination.

Did the trial court err by entering judgment that Boyd take nothing on his ADEA claim?

CORPORATE DISCLOSURE STATEMENT

Respondent Guidant Sales Corporation is a wholly owned subsidiary of Boston Scientific Corporation, a publicly held corporation.

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Other Authority:

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INTRODUCTION

Contrary to the theme of Boyd's brief, both the trial court's judgment and the Fifth Circuit's opinion are in accord with the law as set forth by this Court. Accordingly, this case does not involve any of the grounds set forth in Supreme Court Rule 10 or any other compelling reason to justify discretionary review.

As this Court announced less than one year ago, "To establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 129 S.Ct. at 2350. Boyd failed to meet this standard.

The jury specifically found "that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age . . . ." (5CR:1144, reproduced in the *Petition Appendix* at 23.) This jury question was given before *Gross* issued; it did not use the words "but for." Nevertheless, as this Court has noted, an act or omission is not regarded as a cause of an event if the particular event would have occurred without it. *Gross*, 129 S.Ct. at 2350 (citing and quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS 265 (5th ed. 1984)). Thus, the jury's answer amounts to a finding that Boyd's age was *not* the "but-for" cause of Guidant's decision. *See id.*

Pursuant to the jury's finding, the trial court entered a take-nothing judgment against Boyd. (5CR:1155.) In affirming the judgment, the Fifth Circuit

did not create a heightened causation requirement or employ new standards of review. Instead, in a concise, well-reasoned, unpublished opinion, the Fifth Circuit concluded that "Boyd has had his chance to convince a jury that he would not have been terminated but for his age . . . ." *Boyd v. Guidant Sales Corp.*, 2009 WL 2573407, at *1 (5th Cir. Aug. 21, 2009). The Fifth Circuit noted that, even without the benefit of *Gross*, the trial court reached the correct judgment. *See id.* With regard to Boyd's subordinate evidentiary issue and attorneys' fees challenge below, the Fifth Circuit stated simply that "[t]he district court also did not abuse its discretion in its evidentiary rulings and did not err as a matter of law in regard to the remaining issues on appeal." 2009 WL 2573407, at *1.

Neither the trial court's judgment nor the Fifth Circuit's opinion provides a basis for review under Supreme Court Rule 10. The Fifth Circuit's opinion does not conflict with opinions from this Court, another U.S. court of appeals, or a state court of last resort. *See* SUP. CT. R. 10(a),(c). Furthermore, this case does not involve an important, unsettled question of federal law. *Id.* at 10(c). This Court has settled the question of the standard required to prove a disparate-treatment claim under the ADEA. *See Gross*, 129 S.Ct. at 2350. The Fifth Circuit recognized *Gross* as setting forth the applicable standard and applied that standard to affirm the trial court's judgment. *Boyd*, 2009 WL 2573407, at *1. Because there is no compelling reason for review, the Petition for Writ of Certiorari should be denied. *See* SUP. CT. R. 10.

STATEMENT OF THE CASE

Guidant hired Boyd in 1999, when he already was 55 years old. (3RR:110.) During Boyd's five years of employment with Guidant, his performance appraisals and evaluations consistently reflected that he engaged in rude and insensitive behavior and that clients and co-workers lodged numerous complaints with Guidant. Boyd admits that Guidant received complaints from its employees and customers regarding his personality and attitude. (2RR:144; *Petition* at 5.) This Statement provides a sample of the evidence presented to the jury, demonstrating that – regardless of Boyd's age or the excuses he offered for his rude and insensitive behavior toward customers and patients – his persistent performance problems and continued customer complaints warranted the termination of his employment.

A. Boyd Generated Repeated Complaints From Customers and Co-Workers During His Employment With Guidant

Boyd's job at Guidant required him to interact constantly with clients and to be responsive under potentially life-threatening conditions. (*See* 2RR:151-69.) His work involved pacemakers (which maintain a steady heart rhythm) and defibrillators (which control life-threateningly fast heart rates, and also may incorporate a pacemaker). (*See* 2RR:151.) His job responsibilities included working with doctors during the implant operation, performing follow-up testing on patients, providing training to doctors' staff, and answering questions from doctors' staff. (2RR:152-53, 155-57, 159.)

Throughout most of his employment with Guidant, Boyd's supervisor was Bill Boulter. (3RR:11, 16; D.Ex. 10.) Boulter was a few years older than Boyd. (3RR:11.) Boulter's own supervisor, Kevin McVeigh, was about the same age as Boulter. (*Id.*)

Over the first year and a half of Boyd's employment, Boulter noticed that, although Boyd was technically competent, he tended to treat nurses and staff not as well as he treated the physicians who were customers. (5RR:70.) In the form appraising Boyd's 2001 job performance, Boulter noted that he had received "multiple reports . . . wherein Dave [Boyd] has created considerable ill will among some customers as a result of reported rude and insensitive behavior toward customers and patients." (D.Ex. 10 at Boyd 310; 3RR:34-35.) Nurses and staff, as well as Boyd's co-workers, had reported to Boulter that Boyd was very gruff and unkind, and spoke down to some of the nurses and patients. (*Id.* at 70, 72-73.) The client ill will reached the point that Boyd was not permitted to cover certain doctors' practices. (*Id.* at 71-73.)

Overall, Boulter rated Boyd's 2001 performance as "Needs Improvement." (D.Ex. 10 at Boyd 310.) Boulter summarized that Boyd "recognizes the need to always present a pleasant and professional image and is committed to eliminating negative feedback from any customers and patients." (*Id.*)

Although Boyd made some positive strides "during the later half of 2002," there were continued and frequent complaints from customers and co-workers about Boyd's abrupt and insensitive treatment.

(4RR:168-73; 5RR:70-73, 86-100; D.Ex. 11-12.) Therefore, in his 2002 performance review, Boulter rated Boyd's overall performance as "Improvement Required." (D.Ex. 15 at Boyd 333.) A year later, Boulter still rated Boyd's overall performance as "Improvement Required." (D.Ex. 22 at GSC-B 00097; *see also* 5RR:112-15.)

In March 2004, Boyd was given a warning and "final" opportunity to resolve his continuing issues. (4RR:156, 158; D.Ex. 23.) The "30-Day Evaluation and Final Warning" was presented to Boyd jointly by Boulter (who was moving to a different territory) and Cary Paulette (the incoming supervisor). (3RR:62-63, 65, 84, 234; 5RR:62, 116; D.Ex. 23.) Paulette was in his mid-forties. (3RR:62, 64.) Paulette's own supervisor became Roger Owens, who was in his early thirties. (*Id.*) However, Owens was not involved in the decision to give the final warning. (3RR:225; 4RR:183, 239-40; 5RR:122.)

The list of objectives attached to the final warning included the following: "Treat all physicians, patients, nurses, techs, administrative personnel, fellow reps and FCRs with whom you come in contact pleasantly, with respect and courtesy. Receive no customer complaints. Management reserves the right to review the validity of the complaint. Feedback will actively be solicited from customers and Guidant personnel." (D.Ex. 23 at GSC-B 00138-39.)

At the end of the 30-day period, Boyd was informed that he successfully completed the assessment described in the final warning. (PEx. 41; 3RR:81, 174-76; 4RR:185.) However, in a memo dated June 16, 2004, Guidant made

clear that "it is expected that you will continue to meet or exceed the level of performance required in your position on a sustained basis." (PEx. 41.) Guidant also expressly informed Boyd that "failure to meet the minimum acceptable performance standards for your position will result in immediate termination." (*Id.*)

B. Boyd's Alienation of and Retaliation Against a Guidant Customer Resulted in His Termination

Approximately one month later, Boyd received a call at approximately 2:00 p.m. on a Friday from a nurse at a pacemaker telephone follow-up clinic. (3RR:89.) This type of follow-up involves checking the status of the device's battery. The devices last approximately seven to ten years, and then must be changed out. (2RR:154-55.) As the device battery decays, the "magnet rate" falls. (2RR:159.) For example, the "magnet rate" of the Guidant device starts at 100 and decreases to 85, which is the point at which the device needs to be replaced. (*Id.*) To check the battery status via a telephone follow-up clinic, the patient calls into the clinic and transmits ECGs – one with and one without a magnet placed on the device – over the telephone lines to the clinic for his/her device to be checked. (*Id.* at 158; 3RR:89.)

On this particular occasion, the clinic nurse, Katie Chapman, called Boyd with a problem. (3RR:89, 91, 99.) She told Boyd that the magnet rate of the patient's device had *increased* from 85 at the last follow-up to a current rate of 100. (*Id.*)

Boyd knew that Chapman had not been on the job very long and was calling him for his help in properly

reading the device. (*See* 3RR:89, 92). She was having problems understanding a magnet rating on a device whose previous measurement had been at an end-of-service rate. (3RR:89) Boyd recognized that, if a nurse does not get a proper reading on a device that is, in fact, at the end of service, the risks to the patient could be "catastrophic." (2RR:165-66.) Indeed, he conceded at trial that the situation identified by Chapman could have presented a "premature battery depletion issue." (4RR:119.)

Yet, Boyd pushed aside Chapman's concerns. He told Chapman that he was on his way to an implant, that he would not be done with the implant until her clinic closed, and that it would be Monday before he could get back with her to confirm that there was no problem with the device. (*Id.* at 91-92.) If the patient developed a problem, Boyd advised Chapman to have the patient "thrown into an ambulance and brought to the clinic." (D.Ex. 26; 3RR:252-53; *see* 4RR:123.)

Boyd departed for his implant procedure thinking he had successfully allayed the problem until Monday. (*See* 3RR:92-93.) However, Chapman remained concerned about the anomalous device reading and telephoned a Guidant tech services employee, Jeremy Lind. (3RR:243, 245-46; D.Ex. 25; see also 3RR:93.) She recounted the reading issue and said that her Guidant representative had refused to check the patient. (3RR:246.) Although she was initially hesitant to give the representative's name, she ultimately identified Boyd. (*Id.*) Fearfully, Chapman asked Lind not to contact Boyd. (3RR:246-47.) Nevertheless, Lind responded that he needed to take care of the patient. (3RR:247.)

Thus, about thirty minutes after Boyd spoke with Chapman, he received a call from Lind. (3RR:92-93.) Lind informed Boyd that he had received a call about problems getting someone to check on a patient. (3RR:93, 247; D.Ex. 25.) Boyd responded angrily and repeatedly demanded to know who had called Lind. (3RR:247.) After Chapman was identified as the caller, Boyd told Lind that this was "bullsh*t". (3RR:93-94, 247-48; D.Ex. 25.) And, confirming Chapman's fears, Boyd also told Lind, "I'm going to call that b*tch back, and set her straight." (3RR:159-60, 247-48; D.Ex. 25.) Lind was so concerned about Boyd's attitude and threatening demeanor that he immediately e-mailed Owens and Paulette about the situation. (D.Ex. 25.) Lind also contacted Paulette by phone. (3RR:257-58.)

Before anyone could intervene, Boyd acted on his retaliatory threat against Chapman, a Guidant customer. (3RR:249, 251.) Boyd contacted Chapman's supervisor, Mona Bentzen, to complain. (3RR:95-96, 252-53.) He demanded to know "what was going on" (*id.* at 96), and complained to Bentzen about Chapman's contact with Guidant's technical staff (*id.* at 251, 253; D.Ex. 28). Although the problem between Boyd and Chapman might have begun as a misunderstanding, Boyd's decision to complain to the customer's supervisor created a major incident. (3RR:271.)

Upon learning of the problem on Friday afternoon from Lind, Boyd's supervisor, Paulette, understood the potential severity of the situation and responded immediately. (4RR:3.) Paulette began gathering information by calling Bentzen to find out what actually happened. (3RR:255-57; 4RR:3; *see also* 4RR:187-88,

244-45.) In doing so, Paulette learned of additional, previously unvoiced complaints about Boyd's ongoing behavior. (3RR:243-44, 257, 259-62, 264-70; 4RR:7-8, 12-16, 20-21; D.Ex. 28.)

On Monday, Paulette followed up with Boyd about Friday's events. (3RR:161-62.) From that conversation, Boyd believed that he would be fired. (*Id.* at 162.) Boyd refused to go to the regional office "just to be fired," so by memorandum dated August 2, 2004, Guidant formally informed Boyd that his employment was terminated effective August 3, 2004. (*Id.* at 164-65, 167; 4RR:255-56; P.Ex. 42.)

In the memorandum, Guidant stated that the termination was "due to your continuation of unprofessional behavior, discontent from both internal and external customers and your failure to maintain acceptable level of performance." (P.Ex. 42.) In Owens' words, "David Boyd fired himself." (4RR:231; *see also* 4RR:249-50.) Despite having been told on a number of different occasions to stop treating customers rudely or disrespectfully, Boyd continued to do so. (4RR:231.) Even Boyd admitted that he knew his own behavior and performance were "in part" the reason he was being fired. (3RR:112.)

C. During the Same Time Frame, Two Younger Employees Were Terminated for Treating Customers Rudely

During the same time frame as Boyd's termination, two younger employees were fired for rude treatment of customers. Approximately four months before Boyd

was terminated), Jennifer Henzel was terminated for "the manner in which [she is] perceived by our customers and co-workers, and [her] inability to demonstrate tech competency in covering cases, and in checking patients." (4RR:197; D.Ex. 45.) With regard to customer and co-worker perception, Guidant had "received feedback from both our customers and [Henzel's] peers . . . that [she is] perceived as being arrogant, abrupt, and rude in [her] interactions." (4RR:198; D.Ex. 45.)

As with Boyd: (1) Henzel was a field representative; (2) she reported to Owens; (3) she had been informed that she was required to treat all people with respect and courtesy; (4) she failed to do so; and (5) her employment was terminated. (4RR:196-99; D.Ex. 45). Unlike Boyd, Henzel was 33 at the time of her termination. (4RR:198.)

Similarly, Jeff Sears' employment as a sales representative was terminated approximately two months before Boyd's termination. (4RR:199-200; D.Ex. 46.) Like Boyd, Sears reported to Owens as his supervisor. (4RR:200.) The reasons provided in Sears' termination memo, which notes customer dissatisfaction with his conduct, are strikingly similar to Boyd's. (*Compare* D.Ex. 46 *with* P.Ex. 42.) Yet, unlike Boyd, Sears was 36 or 37 at the time of his termination. (4RR:201.)

D. The Jury Found that Guidant Would Have Terminated Boyd's Employment Regardless of Age

The trial on Boyd's ADEA claim was held in 2007, before this Court issued its opinion in *Gross*. The jury heard approximately four days of testimony and other evidence, including testimony from Boyd relating his version of the events. (*See* 2RR-5RR.) At the close of the case, the jury was faced with three questions as a predicate to any award of damages:

> (1) Do you find from a preponderance of the evidence that Plaintiff's age was a motivating factor in Defendant's decision to terminate Plaintiff's employment?
>
> (2) Do you find from a preponderance of the evidence that Defendant willfully violated the Age Discrimination in Employment Act by discriminating against Plaintiff on the basis of his age?
>
> (3) Do you find from a preponderance of the evidence that Defendant would have made the same decision to terminate Plaintiff's employment even in the absence of consideration of his age?

Petition Apdx. at 22-23. In effect, the question of liability was presented in two parts: Question No. 1 (motivating factor) and Question No. 3 (at the time, framed as a mixed-motives defense). The district court overruled Guidant's objection that Question No. 2 – which asked

about the heightened intent required to impose liquidated damages – should follow, rather than precede, Question No. 3. (*See* 5RR:161.)

With regard to jury charge objections, Boyd contends in his Petition that he objected "to the submission of respondent's mixed-motive affirmative defense, i.e., Question #3." *Petition* at 9. Although it is true that Boyd lodged an objection to Question No. 3, that objection was narrowly limited, as follows:

> Your Honor, plaintiff objects to the inclusion of question number 3 on page 12 of the charge on the basis that the defendant has not submitted – has submitted no evidence, or in the alternative, insufficient evidence for a jury issue to be submitted on this point.
>
> That's the only objection I have.

(5RR:160.)

When presented with the charge, the jury answered Questions No. 1 through 3, "Yes." *Petition Apdx.* at 22-23. Thus, although the jury found in Boyd's favor that age was a motivating factor in the termination decision and that such age discrimination was willful, the jury answered the third question in favor of Guidant. (*Id.*) Because the jury found that Guidant would have made the same decision to terminate Boyd's employment even without considering his age, the trial court entered a take-nothing judgment against Boyd. (5CR:1155.)

E. The District Court Denied Boyd's Request for Attorneys' Fees

In a motion for new trial, Boyd requested attorneys' fees. (5CR:1166-68.) In addition to the fact that Boyd did not meet the ADEA standard for recovering fees, Boyd failed to document the hours spent and services provided by each lawyer and paralegal during over three years of work on the case. (*See* 5CR:1173-78.) Instead, Boyd submitted a summary affidavit that provided only a grand total of hours worked by each lawyer and paralegal who provided unspecified services on the case during a period of more than three years. (5CR:1176.) The summary also did not specify which of the hours worked were governed by which of the hourly rates charged by various personnel over the three-plus-year period. (*Id.*) The trial court denied Boyd's attorneys' fees request. (5CR:1186.)

REASONS FOR DENYING THE PETITION

In an effort to elevate the issues in this case above alleged "error correction," Boyd recasts the Fifth Circuit's analysis as a ground-breaking, standard-changing opinion. For example, in his two "reasons for granting the writ," Boyd argues that the Fifth Circuit "overturned" the jury's finding of willfulness. *Petition* at 12, 17. In fact, the willfulness finding was rendered immaterial by the jury's determination that Guidant would have made the same employment decision even without considering Boyd's age.

That ultimate jury finding prompted the district court's take-nothing judgment, and *Gross* later

confirmed that such finding was outcome determinative. In concluding that the district court's pre-*Gross* judgment comported with the standard announced in *Gross*, the Fifth Circuit took a straightforward approach at odds with Boyd's flamboyant characterizations. It is worth examining what the Fifth Circuit's determination actually involved before analyzing Boyd's version of the opinion.

A. The Fifth Circuit Properly Analyzed Whether the Pre-*Gross* Judgment Comports with the Standards Clarified in *Gross*

Boyd's claim against Guidant is a "mixed-motives" claim under the ADEA. (1CR:15-20.) In a "mixed-motives" claim, an employee alleges that he suffered an adverse employment act because of both permissible and impermissible considerations. *See Gross*, 129 S.Ct. at 2347. Prior to *Gross*, district courts generally applied to ADEA "mixed-motives" claims the same standards applicable to "mixed-motives" claims brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e, *et seq. Cf. Gross*, 129 S.Ct. at 2347-48.

In a Title VII "mixed-motives" claim, the question of liability involves a shifting burden of persuasion. *Gross*, 129 S.Ct. at 2347. If a Title VII plaintiff shows that discrimination was a "motivating" or substantial factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the impermissible

consideration. *Gross*, 129 S.Ct. at 2347; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

In *Gross*, this Court held that the burden of persuasion never shifts to the party defending against a "mixed-motives" ADEA claim. 129 S.Ct. at 2348. The Court examined the ADEA's language, which differs from that used in Title VII. *Id.* at 2349. In order to violate the ADEA, an employer must have taken adverse action "because of" age. *Id.* at 2350. The ordinary meaning of this requirement is that "age was the 'reason' that the employer decided to act." *Id.* Put another way, an ADEA claim cannot succeed unless age both "actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*." *Id.* at 2350 (setting forth quoted language in parenthetical with brackets and emphasis, quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (emphasis added)).

As indicated by the *Hazen Paper* language quoted above and in *Gross*, the Court did not change the components of the liability decision. A showing that age was a "motivating factor" is not sufficient to establish an ADEA violation, but it remains an intermediate consideration in deciding whether age was the "but-for" cause of the adverse decision. Ultimate liability still may be examined in two parts: (1) did age play *any* role in the decision-making process; and (2) if so, was age the *determinative* influence on the decision? *See Hazen Paper*, 507 U.S. 604, 610, 113 S.Ct. 1701; *cf. Gross*, 129 S.Ct. at 2350.

Rather than changing the underlying considerations, the Court clarified the placement of the burden of proof. With regard to the second prong, the employer is no longer required to prove that it would have taken the same action regardless of age; instead, the plaintiff bears the burden to prove that age was the "but-for" cause of the employer's decision. *Compare Gross*, 129 S.Ct. at 2347 *with id.* at 2350. This "but-for" question is case determinative. *Gross*, 129 S.Ct. at 2350 (stating that "[t]o establish a disparate-treatment claim under the plain language of the ADEA," a plaintiff "must prove that age was the 'but-for' cause of the employer's adverse decision).

Because the plaintiff now bears the burden of proof with regard to the entire liability question, juries in future trials may be presented with one overarching liability question. Nevertheless, the jury's intermediate thought process necessarily will involve the same two steps. For example, if a jury concludes that a plaintiff did not prove that age played any role in the decision-making process, the jury has no need to debate whether age rose to the level of the "but-for" cause.

In the case below, the liability question was presented in two components. Question No. 1 presented the "motivating factor" aspect and properly placed the burden of persuasion on Boyd. *Compare Gross*, 129 S.Ct. at 2348 *with* 5CR:1143. Question No. 3 presented the "determinative influence" issue as follows: "Do you find . . . that [Guidant] would have made the same decision to terminate [Boyd's] employment even in the absence of consideration of his age?" (5CR:1144.) If Guidant's decision would have occurred without considering age,

then age cannot be said to be the "but-for" cause. *See* PROSSER & KEETON ON LAW OF TORTS 265 (cited, with parenthetical, in *Gross*, 129 S.Ct. at 2350). Thus, Question No. 3 amounted to a "but-for" question, though it placed the burden of persuasion on Guidant.

Applying the holdings of *Gross* and *Hazen Paper* to the charge given to the jury: (1) Question No. 3 set forth the case determinative issue; but (2) the burden of persuasion should have been placed on Boyd, not Guidant. *See Gross*, 129 S.Ct. at 2348, 2350. The Fifth Circuit accurately observed that "[t]he jury's affirmative answer to the but-for interrogatory shown above [Question No. 3] dooms Boyd's chances of reversal or remand." *Boyd*, 2009 WL 2573407, at *1. Far from ignoring the jury's answers to Questions No. 1 and 2, the Fifth Circuit examined those questions and concluded that the answers did not satisfy the standard under *Gross* for a plaintiff to prevail on a "mixed-motives" ADEA claim. *See id.* It was not enough for Boyd to establish that age played a role in the employment decision, or that Guidant willfully considered age in its decision. *See Gross*, 129 S.Ct. at 2350. Boyd cannot succeed on his ADEA claim unless age rose to the level of the "but-for" cause of Guidant's adverse decision. *Id.* The jury's finding that Guidant's decision would have occurred even without consideration of Boyd's age dooms his claim and precludes reversal or remand. *See Gross*, 129 S.Ct. at 2350; *Boyd*, 2009 WL 2573407, at *1.

As the Fifth Circuit also correctly noted, "Boyd had his chance to convince a jury that he would not have been terminated but for his age . . . ." *Compare Boyd*, 2009 WL 2573407, at *1 *with* 5CR:1144. In the district

court, Boyd had no burden at all with regard to the "but-for" element, yet the jury still found against him. Viewed from the opposite angle, Guidant was subjected to a heightened burden – to negate the "but-for" element – but prevailed. Any error in shifting the burden of persuasion to Guidant was, therefore, harmless. Boyd is not entitled to a new trial to establish an element the jury already decided against him under a *lower* burden of persuasion.

Far from conflicting with *Gross*, *Hazen Paper*, or any other opinion of this Court, the Fifth Circuit's opinion recognizes that the district court's "judgment, albeit without benefit of *Gross*, is correct." *Boyd*, 2009 WL 2573407, at *1. In addition, it is worth noting that both the analysis performed by the Fifth Circuit and the result compelled in this case have limited impact on the law. The analysis and result are confined to a "mixed-motives" ADEA claim (1) submitted to a jury before *Gross* issued, (2) where the jury answered the "mixed-motives" defense question (*i.e.*, the "but-for" question with the burden incorrectly shifted to the employer) in favor of the employer.

In an attempt to sensationalize and expand the impact of the Fifth Circuit's opinion, Boyd characterizes it as: (1) imposing a heightened causation standard in conflict with *Gross*, *Hazen Paper*, and *Reeves*; and (2) overruling the "liability framework" set forth in *Reeves* and *Hazen Paper* for pretext discrimination claims. *Petition* at 11-12, 17. As shown in Sections B and C, below, the Fifth Circuit's opinion does not contain these holdings. *See Boyd*, 2009 WL 2573407, at *1. Nor does the opinion conflict with *Gross*, *Hazen Paper*, *Reeves*, or any other opinion of this Court.

B. The "Willful" Finding Does Not Amount to "But For"Causation

As his first reason for granting the writ, Boyd cites the Fifth Circuit's "holding that *Gross's* newly stated 'but for' causation standard requires causation beyond 'willful.'" *Petition* at 12. No such holding appears in the Fifth Circuit's opinion. *See Boyd*, 2009 WL 2573407, at *1. Moreover, "willfulness" presents an issue of intent, not of causation. *Cf. Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (discussing meaning of willfulness under the ADEA).

In order to recast "willful" as a matter of causation, Boyd focuses on an introductory sentence in the court's charge. *See Petition* at 13. The district court organized the charge into three parts: (1) a host of instructions; (2) a list of jury questions; and (3) a group of "post-argument" instructions. *Petition Apdx.* at 9-22 (instructions), 22-24 (questions). Contained in the midst of the first set of instructions was the following sentence, "If you find [Guidant] terminated [Boyd] because of his age, then you must also determine whether [Guidant's] action was 'willful.'" (5CR:1143.) Boyd argues that use of the phrase "because of" in the instructions means that the jury's "yes" answer to the question of willful intent (Question No. 2) equates to a finding of "but for" causation. *Petition* at 13-15.

There are several critical flaws in this argument. Despite the instructions, Question No. 2 on willful intent was not predicated on a finding that Guidant terminated Boyd "because of" age. Rather, the jury was instructed

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that "If you answered 'yes' to Question No. 1, proceed to answer Question No. 2." *Petition Apdx.* at 22.

Question No. 1 did not ask for or encompass a finding by the jury that Guidant terminated Boyd because of his age. Question No. 1 asked simply, "Do you find . . . that [Boyd's] age was a motivating factor in [Guidant's] decision to terminate [Boyd's] employment?" *Petition Apdx.* at 22. Thus, the jury was not required to find that Guidant terminated Boyd's employment "because of" age before answering Question No. 2. Instead, the jury was required to answer Question No. 2 based on a lesser finding that age was merely a "motivating factor." *See Petition Apdx.* at 22-23 (setting forth Questions Nos. 1 and 2).

If the list of questions required the jury to consider willful intent based only on a predicate "motivating factor" finding, why would the instruction anticipate a higher-level, predicate "because of" finding? This disparity occurred because, as Guidant objected at trial, the "willful" question should have followed Question No. 3. (*See* 5RR:161.) Question No. 3 presented the "because of" or "but for" issue, albeit with the burden shifted to Guidant. *See* Section A, *supra*. Question No. 2 – which did not concern liability, but rather the heightened intent required in order to obtain liquidated damages – should have been asked after both Question No. 1 (whether Boyd established that age was a motivating factor) *and* Question No. 3 (whether Guidant negated age as the "but for" cause). However, the district court ordered the questions such that the jury was required to answer whether Guidant willfully considered age in making its adverse decision before determining

whether Guidant had negated age as the "but for" cause. *See Petition Apdx.* at 22-23.

When the jury was presented with the "because of" or "but for" issue in Question No. 3, the jury found in favor of Guidant. *See Petition Apdx.* at 23; Section A, *supra*. This finding made the issue of intent – *i.e.*, in considering Boyd's age, did Guidant act willfully? – immaterial. *See Rountree v. Smith*, 108 U.S. 269, 274-75, 2 S.Ct. 630, 631, 27 L.Ed. 722 (1883); *Ross v. Up-Right, Inc.*, 402 F.2d 943, 949 (5th Cir. 1968). As the Fifth Circuit properly determined, the jury's findings in Questions No. 1 and 2, that Guidant willfully considered age in deciding to terminate Boyd's employment, are not sufficient under *Gross* to support Boyd's ADEA claim. *Compare Gross*, 129 S.Ct. at 2350; *with Boyd*, 2009 WL 2573407, at *1. Even though the jury believed that Guidant willfully considered Boyd's age, the jury also found that Guidant would have reached the same decision even without *any* consideration of Boyd's age. This answer - not the answer to Question No. 1 about motivating factor or to Question No. 2 about intent – is case determinative. *See Gross*, 129 S.Ct. at 2350.

1. The Fifth Circuit's opinion does not conflict with *Gross*, *Hazen Paper*, or *Reeves*

By affirming the judgment based on the jury's finding that Guidant would have made the same decision regardless of age, the Fifth Circuit's opinion comports with *Gross* and *Hazen Paper*. Both of those cases hold that a plaintiff cannot prevail on a "mixed-motives" ADEA claim where age was not the "but for" cause of, *i.e.*, "determinative influence" on, the employer's

decision. *Gross*, 129 S.Ct. at 2350; *Hazen Paper*, 507 U.S. 604, 610, 113 S.Ct. 1701.

Boyd also asserts that his proof would have been sufficient to establish an ADEA claim under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). It is unclear how *Reeves* applies since it is a "pretext" case rather than a "mixed-motives" case. *See* Section C, *infra*. Nevertheless, it is clear that the Fifth Circuit's opinion does not conflict with *Reeves*.

In *Reeves*, the central issue was whether there was sufficient evidence to support the jury's finding that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves*, 530 U.S. at 138-39 (describing jury's finding and sufficiency challenge), 143 (describing ultimate pretext question). In other words, the question in *Reeves* was whether the evidence was sufficient to support the jury's finding that the employer fired the plaintiff because of age alone. *See id.* In this case, the jury specifically found that Guidant would have fired Boyd regardless of age. The Fifth Circuit's affirmance of the district court's judgment does not conflict with *Reeves*.

2. The ADEA does not authorize Boyd's recovery of attorneys' fees

In one sentence at the end of his first section of argument, Boyd states that the Fifth Circuit's opinion "also improperly disregards the mandatory attorneys' fees requirement" of the ADEA. *Petition* at 16. Although

there are several reasons Boyd is not entitled to recover attorneys' fees, the main reason is that the ADEA's plain language does not authorize them in this case. The ADEA incorporates the attorneys' fees provision of the Fair Labor Standards Act. 29 U.S.C. § 626(b). The FLSA authorizes an attorneys' fees award "in addition to any judgment awarded to the plaintiff . . . ." 29 U.S.C. § 216(b). Because no judgment was awarded to Boyd, the district court properly denied the attorneys' fees request. *See id.*

The inclusion of this issue in Boyd's petition highlights the fact that this proceeding is more about alleged "error correction" than the resolution of important, unsettled issues.

C. This Case Does Not Involve "Pretext" Discrimination

As his second reason for granting the writ, Boyd contends that the "Fifth Circuit has effectively overruled the liability framework established in [*Reeves*] and [*Hazen Paper*] for age discrimination based on evidence of pretext under the ADEA." *Petition* at 17. This argument is founded on the fallacy that this is a "pretext" case. As observed by Justice White over twenty years ago, "The Court has made clear that 'mixed motives' cases, such as the present one, are different from pretext cases . . . ." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (White, J., concurring); *see also id.* at 247 n.12 (majority opinion) (noting that, although a case need not be correctly labeled a "pretext" case or a "mixed-motives" case at the beginning, the district court must decide at some point which type of case it is).

In pretext cases, the true motive for the employer's decision was either the permissible or impermissible consideration, "but not both . . . ." *Price Waterhouse*, 490 U.S. at 260, 109 S.Ct. 1775 (White, J., concurring). "In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Id.*

Neither the district court's judgment nor the Fifth Circuit's opinion has anything to do with a pretext claim under the ADEA. The jury was asked "mixed-motives" questions. *Compare Petition Apdx.* at 22-23 *with* 5TH CIR. PATTERN JURY INSTRUCTIONS – CIVIL 11.11.1. The Fifth Circuit correctly identified Boyd's claim as based on a "mixed-motive theory of ADEA liability." *Boyd*, 2009 WL 2573407, at *1. Indeed, Boyd conceded at trial that his own behavior and performance were "in part" the reason he was fired. (3RR:112.) In reviewing the district court's judgment on Boyd's "mixed-motives" claim, the Fifth Circuit correctly applied the "mixed-motives" standard in *Gross*, rather than the pretext standard used in *Reeves*. *See id.* Thus, Boyd's second "reason for granting the writ" fails.[1]

[1] In the second section of his argument, Boyd recites evidence of a "stray remark" by Owens (Boyd's supervisor's supervisor), which the district court excluded at trial. *Petition* at 18-19. This discussion is improper given that Boyd does not challenge the district court's evidentiary ruling in either of his "Reasons for Granting the Writ." *Id.* at 11. However, in terms of deciding whether to grant Boyd's petition, neither the stray remark nor its exclusion impacts the analysis of the "Reasons for Granting the Writ."

Furthermore, despite their differences, both types of discrimination claims require that the adverse employment decision was made "because of" the impermissible consideration. *See* 29 U.S.C. § 623(a)(1); *Gross*, 129 S.Ct. at 2350 (discussing causation required for plaintiff to prevail on "mixed-motives" claim); *Reeves*, 530 U.S. at 143 (discussing causation required to plaintiff to prevail on pretext claim); *see also Price Waterhouse*, 490 U.S. at 260 (White, J., concurring). Thus, the jury's finding that Guidant negated "but for" causation would be equally fatal to a pretext claim, if Boyd had pursued one.

Boyd's final salvo is that the Fifth Circuit ignored a Title VII standard for reviewing pretext claims when a jury has determined the liability issues in favor of the plaintiff, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *Petition* at 20-21. This argument fails because: (1) the Court has rejected the application of Title VII liability standards to ADEA claims (*see Gross*, 129 S.Ct. at 2349); (2) this case does not involve a pretext claim; and (3) the jury found in favor of Guidant on liability, by determining that Guidant negated the "but for" element.

Boyd's convoluted claims about the Fifth Circuit opinion deflate when compared to the actual opinion and the governing case law. Boyd had the opportunity to convince a jury that his employment was terminated "because of" his age, and he received the benefit of a lower standard than should have been demanded of him. The jury found that Guidant would have made the same employment decision even without considering Boyd's age. Under the standard later enunciated in *Gross*, this

finding precludes Boyd from prevailing on his "mixed-motives" ADEA claim. The Fifth Circuit correctly concluded that the district court's judgment comports with the standard this Court has set. There is no basis for review.

CONCLUSION

Respondent Guidant Sales Corporation prays that the Court deny the Petition for Writ of Certiorari and the relief requested therein.

Respectfully submitted,

KIRSTEN M. CASTAÑEDA
Counsel of Record
EDWARD L. FRIEDMAN
KELLY J. THURMAN
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000

Attorneys for Respondent